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THE

LAWS OF ENGLAND.

VOLUME XV.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XV.

FOOD AND DRUGS.
FRAUDULENT AND VOIDABLE CONVEYANCES.
FRIENDLY SOCIETIES.
GAME.
GAMING AND WAGERING.
GAS.
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See CONSTITUTIONAL LAW.

HIGH TREASON.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

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Kames, Rem. Dec. ..	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752
Kames, Sel. Dec. ..	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854
Keb.	Keble's Reports, fol., 3 vols., 1661—1677
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Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759

Keny. (CH.)	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754
Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835
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L. & G. *temp.* Plunk. ..	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839
L. & G. *temp.* Sugd. ..	Lloyd and Goold's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1835
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830
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L. J. (EX. EQ.)	Law Journal, Exchequer in Equity, 1835—1841
L. J. (K. B. or Q. B.) ..	Law Journal, King's Bench or Queen's Bench, 1822—(current).
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L. J. (O. S.)	Law Journal, Old Series, 10 vols., 1823—1831
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L. J. (P. & M.)	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875
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L. J. (P. M. & A.) ..	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865
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Slaughter-houses - - - ,, PUBLIC HEALTH AND LOCAL ADMINISTRATION.
Summary Jurisdiction - - ,, MAGISTRATES.
Tobacco and Snuff - - - ,, REVENUE; TRADE AND TRADE UNIONS.
Trade Marks - - - - ,, TRADE MARKS.
Water, Purity of - - - ,, WATER SUPPLY.
Weights and Measures - - ,, WEIGHTS AND MEASURES.

Part I.—In General.

Classification of laws relating to food.

1. The laws regulating, so far as quality is concerned (*a*), the preparation and sale of commodities intended for the food or the medicinal use of man may be classified as: (1) those relating to some active interference with the commodity, or with one or other of its constituent parts, by the maker or seller thereof, so as to render it either dangerous or unsuitable as an article of food or medicine, or of a less degree of purity or strength than the purchaser specifically demands or has a right to expect. These are often referred to as the laws against adulteration, and principally consist of statutes of modern date, and of regulations and bye-laws made thereunder (*b*); (2) those laws that prohibit trafficking in commodities which, though when in a sound condition are proper for the food or medicinal use of man, have by reason of disease or other inherent defect become noxious and unwholesome (*c*); (3) certain other enactments which refer specially to the adulteration or sale of particular commodities (*d*).

Implied warranties and conditions on sale of articles of food.

2. The sale of an article of food is subject to the ordinary law relating to the sale of goods (*e*). On such sale there is a *primâ facie* presumption that the article is intended for the food of man, which is sufficient, unless rebutted, to affect the seller with notice that the article is required for a particular purpose, and, where the buyer does not select the specific article, that he relies on the skill or judgment of the seller, and so import the condition that

(*a*) For the law relating to the quantity of goods sold, see title WEIGHTS AND MEASURES.

(*b*) These enactments comprise (1) such of the Sale of Food and Drugs Acts, 1875 to 1907, as are of general application. The Acts so cited are the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), which is often referred to as the principal Act; the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30); the Margarine Act, 1887 (50 & 51 Vict. c. 29); the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51); and the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), which is to be construed as one with the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), and may be cited with the Sale of Food and Drugs Acts as the Sale of Food and Drugs Acts, 1875 to 1907 (Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 14). (2) Such measures as the Bread Act (London), 1822 (3 Geo. 4, c. cvi.); the Bread Act, 1836 (6 & 7 Will. 4, c. 37); the Adulteration of Coffee Act, 1718 (5 Geo. 1, c. 11), s. 23; the Adulteration of Tea and Coffee Act, 1724 (11 Geo. 1, c. 30), ss. 5, 9, 39; the Adulteration of Tea Act, 1730 (4 Geo. 2, c. 14), s. 11; the Adulteration of Tea Act, 1776 (17 Geo. 3, c. 29); the Customs and Inland Revenue Act, 1882 (45 & 46 Vict. c. 41), ss. 5, 6.

(*c*) In this class may be included such of the rules of the common law regarding the sale of food as have not been embodied in Acts of Parliament, and such statutory provisions as the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116 to 119, as amended and extended by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28; the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47; the Public Health (Regulations as to Food) Act, 1907 (7 Edw. 7, c. 32); the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 15, 20; the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 31; and the provisions of certain local Acts.

(*d*) *E.g.*, the Adulteration of Hops Act, 1733 (7 Geo. 2, c. 19), for which see title AGRICULTURE, Vol. I., p. 291.

(*e*) See title SALE OF GOODS.

PART I. In General.

the article shall be wholesome and fit for human food (*f*). On a sale of an article of food where the buyer has selected the specific article, or has had an opportunity of inspection, the maxim *caveat emptor* applies, and no warranty of fitness for food is implied against an innocent seller (*g*): but where a buyer orders articles of food to be supplied, and trusts to the judgment of the seller to select the goods, there is an implied condition that they shall on receipt be fit for the food of man (*h*), and such an implied condition is not excluded by an express warranty in the contract, which may be superadded to, and not intended to qualify, the implied condition (*i*).

Recovery of penalties and costs as damages.

3. In an action brought by any person for a breach of contract on the sale of any article of food or of any drug, such person may recover, alone or in addition to any other damages recoverable by him, the amount of any penalty in which he may have been convicted under the Sale of Food and Drugs Acts, together with the costs paid by him upon such conviction and those incurred by him in and about his defence thereto, if he prove that the article or drug was sold to him as and for an article or drug of the same nature, substance, and quality as that which was demanded of him, and that he purchased it not knowing it to be otherwise, and afterwards sold it in the same state as that in which he purchased it. The defendant in such action may, however, prove that the conviction was wrongful, or that the amount of costs awarded or claimed was unreasonable (*k*).

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14.

(*g*) *Burnby* v. *Bollett* (1847), 16 M. & W. 644; *Emmerton* v. *Mathews* (1862), 7 H. & N. 586; *Smith* v. *Baker, Son & Death* (1878), 40 L. T. 261.

(*h*) *Beer* v. *Walker* (1877), 46 L. J. (Q. B.) 677 (rabbits); *Burrows* v. *Smith* (1894), 10 T. L. R. 246 (partridges); *Wallis* v. *Russell*, [1902] 2 I. R. 585, C. A. (crabs); *Wren* v. *Holt*, [1903] 1 K. B. 610, C. A. (beer containing arsenic); *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A. (milk); and compare *Fergusson* v. *Malvern Urban District Council* (1908), 72 J. P. 101; *Brown* v. *Butler* (1908), *Times*, 27th March; and *Newbury* v. *Perowne* (1908) and *Hand* v. *Slaters, Ltd.* (1907), all three cited 72 J. P. (Journal) 302. Reference may also be made to *Chaproniere* v. *Mason* (1905), 21 T. L. R. 633, C. A.; *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A.; *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193, C. A.; and to title SALE OF GOODS. But a statement that goods must be taken with all faults and without a warranty will relieve the vendor from liability to an action by the purchaser, even though the vendor be morally, and under statute legally, culpable (*Ward* v. *Hobbs* (1878), 4 App. Cas. 13).

(*i*) *Bigge* v. *Parkinson* (1862), 7 H. & N. 955, Ex. Ch.

(*k*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 28. On the sale of any article of food which is to be resold as an eatable or drinkable, the seller cannot recover the price if the article is utterly bad, uneatable, or undrinkable, and so unsaleable (*Harman* v. *Bennett* (1858), 1 F. & F. 400). Where a retailer buys provisions with an express or implied warranty, and they are subsequently seized and condemned as unfit for human food, and the retailer is fined, he can, if he had no knowledge of the unsoundness, recover from the seller the value of the goods, together with the costs of his defence and the costs ordered to be paid by him. Possibly, too, he may recover the amount of the fine he has had to pay, if he can show that the fine was not imposed, nor the amount thereof increased, in consequence of any default or wrongful act on his part (*Crage* v. *Fry* (1903), 67 J. P. 240). As to the measure of damages flowing from a breach of warranty including costs of legal proceedings, reference may be made to *Dixon* v. *Fawcus* (1861), 3 E. & E. 537; *Knowles* v. *Munns* (1866), 14 L. T. 592; *Smith* v. *Green* (1875), 1 C. P. D. 92; *Hammond & Co.* v. *Bussey* (1887),

Part II.—Adulteration.

SECT. 1.—*The Sale of Food and Drugs Acts.*

SECT. 1. The Sale of Food and Drug Acts.

4. The law relating to the adulteration of food and drugs, that is, the admixture with an article, intended for food or for medicinal use, of any other substance, whether noxious or harmless, or the abstraction of any constituent part, whereby in either case the quality, substance, or nature of the article is injuriously affected (*l*), is mainly contained in the various Acts of Parliament which are usually cited as the Sale of Food and Drugs Acts (*m*).

Meaning of "adulteration."

SECT. 2.—*Definitions.*

5. For the purposes of the Acts the term "food" includes every article used for food or drink by man, other than drugs (*n*), or water (*o*), and any article which ordinarily enters into or is used in the composition or preparation of human food, and also includes flavouring matters and condiments (*p*).

"Food."

20 Q. B. D. 79, C. A.; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413, C. A.; *Scott* v. *Foley, Aikman & Co.* (1899), 16 T. L. R. 55; *Holden, Ltd.* v. *Bostock & Co., Ltd.* (1902), 50 W. R. 323, C. A.; *Clare* v. *Dobson* (1910), 103 L. T. 506; and see title DAMAGES, Vol. X., pp. 326, 336. As to the civil remedies of a buyer, see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 51—54, and title SALE OF GOODS.

(*l*) The question whether there has been adulteration is one of fact, not of law, and cannot be raised on a case stated (*Fyfe* v. *Hamilton* (1894), 1 Adam, 484—a Scottish case).

(*m*) For these Acts, frequently referred to in this title as "the Acts," see note (*b*) on p. 3, *ante*. For the special provisions dealing with the sale of drugs and medicines, other than in respect of adulteration, see title MEDICINE AND PHARMACY. It must be remembered that the Sale of Food and Drugs Acts do not apply to decomposition or deterioration of articles, where that happens without active human intervention, as to which see p. 35, *post*. As the Acts extend to Scotland and Ireland, the decisions of the courts of those countries upon the various provisions, though not binding upon English courts, are of weight, and in some instances deal with points not yet raised in England. These decisions are, accordingly, referred to for purposes of illustration.

(*n*) See p. 6, *post*, for definition of "drug."

(*o*) For the law relating to the purity of water, see title WATER SUPPLY.

(*p*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 26. The definition is a very wide one, and was drafted to avoid the narrow construction placed upon the repealed definition of "food," as including every article used for food or drink by man (Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 2), by the decision in *James* v. *Jones*, [1894] 1 Q. B. 304, that baking powder was not an article of food. See also *Warren* v. *Phillips* (1880), 44 J. P. 61. Such a substance is now clearly within the Acts. The definition given in the text may be compared with the definition of the word "victuals" given by Lord TENTERDEN, C.J., in *R.* v. *Hodgkinson* (1829), 10 B. & C. 74. That expression, he said, comprised everything which constituted an ingredient in the food of man, and all articles which mixed with others constituted food. Barm or yeast was there held to be within the term, and is undoubtedly within the modern definition. For the purposes of the regulations made under the Public Health (Regulations as to Food) Act, 1907 (7 Edw. 7, c. 32), an "article of food" means an article of food which, as part of the cargo of a ship, is brought to, or delivered, or landed at a place within England or Wales, either as a place of actual or appointed destination, or as a place of deposit for the purpose of transmission to a place of actual or appointed destination elsewhere in the United Kingdom (Public Health (First Series: Unsound Food) Regulations,

SECT. 2. Definitions.

"Drug."

6. The term "drug" includes medicine for internal or external use (*q*). In any case of doubt, it will be a question of fact for the determination of the court whether an article is a drug or not, and the answer will depend upon whether or not the substance was sold for the purpose of use as a medicine (*r*). An article is not necessarily a drug because it is included in the British Pharmacopœia and may be used in the preparation of medicines (*s*), nor is an article a drug merely because it is sold under a designation which implies that it contains a drug in its composition, when in fact it does not (*t*).

"County."

7. The term "county" includes every county, riding, and division, as well as every county of a city or town not being a borough (*a*), and every liberty having a separate court of quarter sessions, except a liberty of a Cinque Port (*b*). Every liberty of a Cinque Port not comprised within the jurisdiction of a borough is deemed to be part of the county in which it is situated, and subject to the jurisdiction of the justices of such county (*c*).

"Importer."

8. The term "importer" includes any person who, whether as owner, consignor or consignee, agent or broker, is in possession of, or in anywise entitled to the custody or control of, the particular imported article concerned (*d*).

"Local authority."

"Public analyst."

9. "Local authority" means any local authority authorised to appoint an analyst (*e*) for the purposes of the Acts, and the expression "public analyst" means an analyst so appointed (*f*).

1908, Statutory Rules and Orders, 1908, p. 801; Public Health (Foreign Meat) Amending Regulations, 1909, Statutory Rules and Orders, 1909, p. 660); and see p. 43, *post*.

(*q*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 2.

(*r*) See *Fowle* v. *Fowle* (1896), 60 J. P. 758.

(*s*) *Ibid.* In this case it was held that beeswax sold by a grocer was not a drug. If, however, the sale had been by a chemist it is possible that a different decision might have been arrived at.

(*t*) *Houghton* v. *Taplin* (1897), 13 T. L. R. 386, where HAWKINS, J., was of opinion that soap sold as arsenical soap, though in fact it did not contain any arsenic, was not a drug. Chewing gum, sold as an article to be chewed only and not to be eaten, and not to be used medicinally, is neither an article of food nor a drug within the meaning of the Acts (*Bennett* v. *Tyler* (1900), 64 J. P. 119; *Shortt* v. *Smith* (1895), 11 T. L. R. 325).

(*a*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 2.

(*b*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 7.

(*c*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 32.

(*d*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (2). For the purposes of the regulations made by the Local Government Board under the Public Health (Regulations as to Food) Act, 1907 (7 Edw. 7, c. 32), "importer" means any person in the United Kingdom who, either as owner or consignee, agent or broker, is entitled to the possession, custody, or control of any article of food (Public Health (First Series: Unsound Food) Regulations, 1908, Statutory Rules and Orders, 1908, p. 801).

(*e*) For these authorities, see p. 8, *post*.

(*f*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 25. For definitions of the terms "butter," "butter factory," "cheese," "margarine," "margarine cheese," "milk-blended butter," and "exhausted tea," see pp. 53, 54, 68, *post*.

SECT. 3.—*Administration of the Acts.*

SECT. 3. Administration of the Acts.

10. The duty of administering the Acts (*g*) is imposed primarily on the local authorities (*h*).

Duty of local authorities.

The extent of this duty is to appoint analysts of all articles of food and drugs sold within their jurisdiction, or, alternatively, in the case of town councils, to employ for such purpose an analyst appointed for any neighbouring borough or for the county in which the borough is situated; to put in force from time to time, as occasion may arise, the powers with which the authority are invested, so as to provide proper securities for the sale of food and drugs in a pure and genuine condition; and, in particular, to direct their officers (*i*) to take samples for analysis (*k*). Further, when the Local Government Board or the Board of Agriculture and Fisheries have directed their officer to take samples of any article of food (*l*), and have communicated the result of the analysis of any such sample to the local authority, such authority must cause proceedings to be taken as if they themselves had caused the analysis to be made (*m*).

Defaulting authorities.

11. The duty to appoint an analyst may be enforced by mandamus (*n*), but there seems to be no means of compelling an authority to order their officers to take samples of any particular article, or to perform any of their other duties under the Acts. Where, however, the Local Government Board or the Board of Agriculture and Fisheries, after communication with a local authority, are of opinion that the authority have failed to execute any of the provisions of the Acts in relation to any article of food, and that their failure affects the general interest of the consumer, or the general interest of agriculture in the United Kingdom, as the case may be, the Board concerned may, by order, empower an officer of the Board to execute and enforce those provisions or to procure the execution and enforcement thereof in relation to any article of food mentioned in the order (*o*).

The expenses incurred by the Board or their officer under any such order must be treated as expenses incurred by the local

(*g*) For these Acts see note (*b*) on p. 3, *ante*.

(*h*) As to these authorities, see Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 25, p. 6, *ante*, and p. 8, *post*. As to prosecutions by inspectors in boroughs which are not empowered to appoint an analyst, see *Worthington* v. *Kyme* (1905), 93 L. T. 546.

(*i*) For these officers, see p. 12, *post*.

(*k*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 10, 11; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 3 (1).

(*l*) As to when they may do so, see p. 13, *post*.

(*m*) Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 2 (2). The words "as if the local authority had caused the analysis to be made," in this sub-section, mean "as if the local authority had put their inspector in motion to obtain samples and cause an analysis to be made" (*Connor* v. *Butler*, [1902] 2 I. R. 569, *per* Lord O'BRIEN, C.J., at p. 574).

(*n*) See *R.* v. *Leicester Guardians* (1899), 68 L. J. (Q. B.) 945; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387; and title CROWN PRACTICE, Vol. X., p. 85.

(*o*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 3 (2).

SECT. 3. Administration of the Acts.

authority in the execution of the Acts (*p*), and must be paid by the authority to the Board on demand. In default of payment the Board may recover the amount of such expenses with costs from the authority (*q*). Any such order of the Board will be conclusive in respect of any default, amount of expenses, or other matter therein stated or appearing (*r*).

Prosecutions.

12. Prosecutions for offences under the Acts are generally instituted by the appointed officers of the local authorities (*a*), but private persons may institute and maintain proceedings, either as persons aggrieved or as common informers (*b*).

Importation.

13. So far as the Acts relate to the importation of articles of food and drugs into this country, the administration is vested in the Commissioners of Customs (*c*).

SECT. 4.—*The Public Analyst.*

SUB-SECT. 1.—*Appointment and Duties.*

Appointment of public analyst.

14. It is the duty of every local authority entrusted with the execution of the laws relating to the sale of food and drugs to appoint one or more persons possessing competent knowledge, skill, and experience, as analysts of all articles of food and drugs sold within their city, metropolitan borough, county, or borough, as the case may be, and also duly to fill any vacancy in the office when such occurs (*d*). In the City of London and the liberties thereof this power is vested in the Court of Common Council (*e*), in all other parts of the metropolis in the councils of the metropolitan boroughs (*f*), in counties in the county councils (*g*), in county boroughs, and in all quarter sessions boroughs containing a population of 10,000 or upwards (by the census of 1881) in the town councils (*h*). A county council may either appoint separate analysts for the smaller boroughs, or may put the boroughs under the county analyst (*i*).

Removal.

The council appointing an analyst may remove him, but both the appointment and removal of an analyst are subject to the approval

(*p*) For expenses, see p. 34, *post*.
(*q*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 3 (3).
(*r*) *Ibid.*, s. 3 (4).
(*a*) For these officers, see p. 12, *post*.
(*b*) See pp. 29 *et seq.*, *post*.
(*c*) See pp. 43, 55, *post*.
(*d*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 10; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 3 (1). The Local Government Board and the Board of Agriculture and Fisheries have power to compel a local authority by mandamus to appoint an analyst (compare *R.* v. *Leicester Guardians* (1899), 68 L. J. (Q. B.) 945; and see title CROWN PRACTICE, Vol. X., p. 85).
(*e*) By transfer from the Commissioners of Sewers (City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.)).
(*f*) As successors to the vestries and district boards (London Government Act, 1899 (62 & 63 Vict. c. 14)).
(*g*) By transfer from quarter sessions (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (10)).
(*h*) *Ibid.*, ss. 34, 35.
(*i*) *Ibid.*, ss. 38, 39.

of the Local Government Board (*k*), and the person appointed must furnish such proof of competency as may from time to time be required by regulation framed by the Board (*l*). No person may now be appointed an analyst who is engaged directly or indirectly in any trade or business connected with the sale of food or drugs in the place for which he is appointed (*m*).

Remuneration.

The analyst is to be paid by the council appointing him such remuneration as may be agreed upon (*n*).

The town council of any borough which is entitled to appoint an analyst may agree that the analyst appointed for any neighbouring borough, or for the county in which the borough is situated, shall act for their borough during such time as the said council shall think proper, and in such case must make due provision for the payment of his remuneration; and, if such analyst consents, he will during such time be the analyst for such borough for the purposes of the Acts (*o*).

Right of purchaser to submit article for analysis.

15. Any purchaser of an article of food or of a drug is entitled to submit it for analysis to the analyst for the place within which it is purchased, on payment to such analyst of a sum not exceeding 10*s.* 6*d.*, and to receive from him a certificate of the result of his analysis (*p*), and any appointed public officer (*q*) who procures a sample of food or drugs which he suspects to have been sold to him contrary to any provision of the Acts, and of which he desires to have an analysis, must submit one part of such sample to be analysed by the analyst appointed for the place in which such officer acts, or, if there is no such analyst acting for such place, to the analyst of another place, and the analyst upon receiving payment of a sum not exceeding 10*s.* 6*d.* if acting for such place, or, if acting for another place, of such sum as may be agreed upon, must, with all convenient speed, analyse the same, and give a certificate to such officer specifying the result of the analysis (*r*).

An analyst cannot for the purposes of the Acts analyse a sample which an inspector has taken out of the district for which such inspector was appointed (*s*).

Analyst's report.

16. Every public analyst must report quarterly to the authority appointing him the number of articles analysed by him under the

(*k*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 10.

(*l*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 3 (5). By regulation dated 7th March, 1900, and a circular letter of the following day, the Board laid down the subjects in which a public analyst must give evidence of his skill and knowledge, and the method of proof. They are (1) analytical chemistry, (2) therapeutics, and (3) microscopy.

(*m*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 10.

(*n*) *Ibid.*

(*o*) *Ibid.*, s. 11.

(*p*) *Ibid.*, s. 12 ; and see p. 10, *post.*

(*q*) For the appointment of officers to procure samples, see p. 12, *post.*

(*r*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 12, 13; and see p. 10, *post.*

(*s*) *McNair* v. *Cave*, [1903] 1 K. B. 24, *per* Lord ALVERSTONE, C.J., at p. 28; and see *R.* v. *Smith*, [1896] 1 Q. B. 596, which was a case on a warranty, and has been superseded by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, but the applicability of the observations of HAWKINS, J., as to the limitations of the analyst's power, appears to be unaffected.

SECT. 4. The Public Analyst.

Acts during the foregoing quarter, and must specify the result of each analysis, and the sum paid to him in respect thereof. Such report must be presented at the next meeting of the authority appointing the analyst, and the authority must transmit annually to the Local Government Board a certified copy of such quarterly report (*t*).

SUB-SECT. 2.—*The Certificate.*

Form of analyst's certificate.

17. The certificate which the analyst must give of the result of his analysis must be in the prescribed form, or to the like effect (*a*).

The analyst should be careful to keep as near as possible to the prescribed form (*b*), and to state with precision the result of his examination. Where he does not find adulteration, he need not set out the constituent parts of the sample, but need only state the result of the analysis (*c*), but if there be adulteration in any degree he should not indulge in vague generalities nor content himself with merely expressing his own opinion (*d*). In such case he should set out the constituent parts of the sample with such clearness that the justices may be able upon the *data* he gives to form their own opinion as to whether the article was or was not adulterated (*e*).

(*t*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 19. The Board has directed, by circular letter dated 1st January, 1879, that the reports should be made up to the last day of March, June, September, and December respectively, and should be forwarded to the Board in January of each year.

(*a*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 18.

The prescribed form is as follows :—

To [*here insert the name of the person submitting the article for analysis*].

I, the undersigned, public analyst for the . , do hereby certify that I received on the day of , 19 , from [*here insert the name of the person delivering the sample*], a sample of for analysis (which then weighed [*when the article cannot be conveniently weighed, this passage may be erased, or the blank may be left unfilled*]), and have analysed the same, and declare the result of my analysis to be as follows: I am of opinion that the same is a sample of genuine , *or*, I am of opinion that the said sample contained the parts as under, or the percentage of foreign ingredients as under :—

Observations.

[*Here the analyst may insert at his discretion his opinion as to whether the mixture (if any) was for the purpose of rendering the article portable or palatable, or of preserving it, or of improving the appearance, or was unavoidable, and may state whether in excess of what is ordinary, or otherwise, and whether the ingredients or materials mixed are or are not injurious to health.*]

As witness my hand this day of . (*ibid.*, Schedule.)

(*b*) *Hunter* v. *Wintrup* (1904), 4 Adam, 471 (a Scottish case); and see *Hull* v. *Horsnell* (1904), 68 J. P. 591.

(*c*) *Bakewell* v. *Davis*, [1894] 1 Q. B. 296.

(*d*) *Newby* v. *Sims*, [1894] 1 Q. B. 478. Here a certificate, "I find the sample contains an excess of water over and above what is allowed by Act of Parliament; I estimate the excess of water at 13 per cent. of the entire sample; I am of opinion that the said sample is not a sample of genuine rum," was held to be bad for vagueness. It ought to have stated the total amount of water found in the sample. In *Lee* v. *Bent*, *Barlow* v. *Noblett*, [1901] 2 K. B. 290, 292, the certificates stated respectively "We are of opinion that the said sample contains arsenic" and "We are of opinion that the said sample contains a serious quantity of arsenic." Both were held to be insufficient.

(*e*) *Fortune* v. *Hanson*, [1896] 1 Q. B. 202, where a certificate "I am of opinion that the said sample contained the percentage of foreign ingredients as under: —5 per cent. of added water to the prejudice of the purchaser" was held to be bad. "The certificate must state such facts as would enable the justices themselves to come to a conclusion whether the article of food in question had or had

The insertion in the certificate of the weight of the sample is not obligatory unless the weight is a material factor in the analysis; and its omission will not necessarily invalidate the certificate (*f*). When the space for the weight of the sample is left blank, it is not necessary that the certificate should contain a statement that the article could not conveniently be weighed (*g*). Weight of sample.

The "observations" (*h*) are to be made only in a case of adulteration. An unauthorised or improper expression of opinion by the analyst, which does not amount to a finding of fact, will not necessarily vitiate the certificate (*i*). Analyst's observations.

18. In the case of a certificate regarding milk, butter, or any article liable to decomposition, the analyst must specially report whether any change had taken place in the constitution of the article that would interfere with the analysis (*j*), and if he omits to do so the certificate will be bad, and the defect cannot be cured by calling the analyst as a witness at the hearing of the summons (*k*). Certificates as to milk etc.

In certifying the result of an analysis of milk, cream, butter, or cheese, the analyst must have regard to the regulations made by the Board of Agriculture and Fisheries in connection with those articles (*l*).

It is not necessary that the certificates given by the Government analysts should be in the prescribed form (*m*). Certificate of Government analyst.

19. The giving of a certificate by a public analyst is a condition precedent to a prosecution by an inspector or other official (*n*), though not to proceedings by a private purchaser (*o*), and at the Prosecutions.

not been adulterated" (*ibid.*, *per* HAWKINS, J., at p. 205). In *Bridge* v. *Howard*, [1897] 1 Q. B. 80, the certificate stated "I am of opinion that the sample contains the parts as under:—Milk, 94 per cent.; added water, 6 per cent. This opinion is based on the fact that the sample contained 7·97 solids not fat, whereas genuine milk contains not less than 8·5 solids not fat." This certificate was held to be good, because the analyst not only stated the percentage of added water, but also gave the scientific basis on which his conclusion rested. See, also, *Lee* v. *Bent*, *Barlow* v. *Noblett*, [1901] 2 K. B. 290, *per* Lord ALVERSTONE, C.J., at p. 295; *Findley* v. *Haas* (1903), 67 J. P. 198, where a certificate that brandy had been "reduced from 25 per cent. under proof to 27·6 per cent. under proof" was held to be good; *Hull* v. *Horsnell* (1904), 68 J. P. 591, *per* Lord ALVERSTONE, C.J., at p. 592; and *Bayley* v. *Cook* (1905), 69 J. P. 139.

(*f*) *Sneath* v. *Taylor*, [1901] 2 K. B. 376.

(*g*) *Hunter* v. *Wintrup* (1904), 4 Adam, 471 (a Scottish case).

(*h*) See note (*a*), p. 10, *ante*.

(*i*) *Bakewell* v. *Davis*, [1894] 1 Q. B. 296. But in a case under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 3 (see p. 16, *post*), the certificate will not be insufficient because it does not expressly state that the article has been rendered injurious to health by an admixture (*Hull* v. *Horsnell*, *supra*).

(*j*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), Schedule. The direction to so report is imperative (*Hunter* v. *Wintrup*, *supra*).

(*k*) *Hudson* v. *Bridge* (1903), 67 J. P. 186. In this case vinegar of squills was held to be an article liable to decomposition. In a case at Hanley Police Court on 2nd January, 1911 (see 75 J. P. 16), the magistrate held that sweet spirit of nitre was not an article liable to decomposition.

(*l*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 4 (1); and see pp. 54, 64, *post*.

(*m*) See p. 32, *post*.

(*n*) *Peart* v. *Barstow* (1880), 44 J. P. 699; *Smart & Son* v. *Watts*, [1895] 1 Q. B. 219; and see *R.* v. *Smith*, [1896] 1 Q. B. 596.

(*o*) *Buckler* v. *Wilson*, [1896] 1 Q. B. 83. But see, *contra*, *R.* (*Barry*) v. *Mahony*,

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hearing of the information the production of the certificate is *primâ facie* evidence of the facts therein stated (*p*). If no evidence is given to contradict it the justices ought to act upon it, and cannot set their own opinion against that of the analyst (*q*). But the certificate is only evidence against the actual defendant, and not against third parties (*r*); and it is always open to the defendant to rebut the certificate by other evidence (*s*).

SECT. 5.—*Procuring Samples for Analysis.*

Who may procure samples.

20. Any purchaser of an article of food or of a drug may have it analysed (*t*), and, if so advised, may proceed against the seller in respect of any adulteration (*a*). For the further protection of the public it is also provided that any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market (*b*), or any police constable, under the direction and at the cost of the local authority charged with the execution of the Acts (*c*), or appointing such officer, inspector, or constable, may procure any sample of food or drugs, and if he suspects the same to have been sold to him contrary to any provision of the Acts he must submit the same to be analysed by the analyst (*d*) of the district or place for which he acts, or, if there be no such analyst then acting for such place, by the analyst of another place (*e*).

[1909] 2 I. R. 490, where it was held that an analyst's certificate must be obtained by every prosecutor, whether private or official.

(*p*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21; see, further, p. 31, *post*.

(*q*) *Harrison* v. *Richards* (1881), 45 J. P. 552; *Elder* v. *Dryden* (1908), 72 J. P. 355. But the certificate is sufficient only where there is no evidence to the contrary, *per* LINDLEY, L.J., in *Hewitt* v. *Taylor*, [1896] 1 Q. B. 287, 289; and as to the proceedings at the hearing and the conclusiveness of the certificate, see p. 31, *post*.

(*r*) *Tyler* v. *Kingham & Son, Ltd.*, [1900] 2 Q. B. 413.

(*s*) *Todd* v. *Cochrane* (1901), 38 Sc. L. R. 801. As to analysis by the Government analysts, see p. 32, *post*. For the offence of forging or falsifying the analyst's certificate, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 760.

(*t*) A private purchaser is not obliged to submit the article to the public analyst, nor is it absolutely necessary for the article to be analysed at all, if other satisfactory proof can be given that the article is adulterated. If a private analyst is employed, he will have to be called as a witness at the hearing of the summons, as his certificate alone will not be evidence. Where an article or drug is purchased for consumption, and subsequently the purchaser decides to have it analysed, he need not have conformed to the requirements of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 14 (see p. 15, *post*; *Buckler* v. *Wilson*, [1896] 1 Q. B. 83; *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181; *Enniskillen Guardians* v. *Hilliard* (1884), 14 L. R. Ir. 214). The decisions to the contrary in *Parsons* v. *Birmingham Dairy Co.* (1882), 9 Q. B. D. 172, and *Harris* v. *Williams* (1889), 6 T. L. R. 47, must be considered as overruled; but see, *contra*, *R.* (*Barry*) v. *Mahony*, [1909] 2 I. R. 490.

(*a*) See p. 29, *post*.

(*b*) For the appointment etc. of medical officers of health and inspectors of nuisances, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; of inspectors of weights and measures, see title WEIGHTS AND MEASURES; and of inspectors of markets, see title MARKETS AND FAIRS.

(*c*) For the local authorities entrusted with the duty of enforcing the Acts, see p. 8, *ante*.

(*d*) For the appointment etc. of analysts, see p. 8, *ante*.

(*e*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 13. For taking

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Powers of Government Departments.

21. In addition, the Local Government Board may, in relation to any matter appearing to that Board to affect the general interest of the consumer, and the Board of Agriculture and Fisheries may, in relation to any matter appearing to that Board to affect the general interests of agriculture in the United Kingdom, direct an officer of the Board to procure for analysis samples of any article of food, but not of drugs, and thereupon such officer will have all the powers of procuring samples conferred by the Acts (*f*).

Where samples may be procured.

22. The sample is usually taken at the shop or place of business of the seller, but an officer may procure at the place of delivery any sample of milk, and, with the consent or upon the request of the purchaser or consignee, any sample of any other article of food, but not of drugs, in course of delivery (*g*) to such purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such article (*h*), and a refusal by the seller or consignor, or by any person or persons entrusted by him with the charge of such article, to allow a sample to be so taken may be punished by the infliction of a penalty not exceeding £10 (*i*).

Refusal to sell.

23. Where an officer, inspector, or constable applies to purchase any article of food or any drug exposed for sale or on sale by retail on any premises, or in any shop or stores, or in any street or open place of public resort, and tenders the price for the quantity which he requires for the purpose of analysis, not being more than is reasonably requisite, a refusal to sell by the person exposing the

samples of tea, see p. 68, *post;* samples of milk, see p. 66, *post;* samples of butter and margarine, see p. 56, *post;* and as to samples of imported articles, see p. 44, *post.*

(*f*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 2. The officers of the Board are also entitled to institute proceedings as private individuals in the manner prescribed by the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63) (see p. 29, *post*), and are not limited in prosecutions at their instance to cases contemplated by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51) (*Falconer* v. *Whyte*, [1908] S. C. (J.) 40).

(*g*) The sample cannot be taken under this provision while the article is in course of transit from the seller or consignor to the purchaser or consignee, nor after the delivery of the article to the purchaser or consignee has been completed, and difficulties constantly arise as to when, in the particular circumstances of the case, the article is "in course of delivery" and "at the place of delivery." It is generally necessary to look at the contract between the parties, and if the contract designates a place for the delivery, that is the place of delivery, even though the purchaser pays the carriage to that place; and the article is in course of delivery until possession is actually taken by the purchaser (see *Filshie* v. *Evington*, [1892] 2 Q. B. 200; *Lush* v. *Wilson* (1890), 54 J. P. 73; *Sanders* v. *Sandler* (1906), 71 J. P. 3; *McNair* v. *Cave*, [1903] 1 K. B. 24; also cases cited at p. 66, *post*).

(*h*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 14; Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3; and as to samples of milk in course of delivery, see p. 66, *post.* A private person cannot take a sample of an article in course of delivery (*Harris* v. *Williams* (1889), 6 T. L. R. 47); but an authorised officer may direct his assistant to take a sample and may then prosecute in his own name (*Tyler* v. *Dairy Supply Co., Ltd.* (1908), 72 J. P. 132). A milkman hawking milk from door to door sells to a customer under a "contract" within the meaning of the section (*Phelan* v. *Rorke* (1883), 17 I. L. T. 649).

(*i*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 4; and see Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 16, and p. 34, *post.*

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same for sale renders him liable to a similar penalty (*k*). A master is responsible for the refusal of his servant to sell (*l*), and the servant may be made personally responsible for such a refusal.

Purchase by agents.

24. Although only persons of the designated classes can be appointed by the local authority for the purpose of procuring samples for analysis, the authorised persons need not act personally in every case. The authorised officer or constable may employ an assistant to make the actual purchase (*m*), but he himself must take the subsequent proceedings.

How the sample is taken.

25. The sample must be taken from any open receptacle or parcel indicated by the officer, which contains an article which is exposed or intended for sale, either by wholesale or retail (*n*), but the officer is not entitled to require a particular bottle, or cask, or parcel to be opened in order to supply the article he asks for (*o*), and where an article of food or a drug is exposed for sale in an unopened tin or packet duly labelled, the vendor cannot be required to sell it except in such unopened tin or packet (*p*). It would seem, too, that the officer must unequivocally ask for the article by name; it is not sufficient to require a sample of the contents of a particular receptacle (*q*); but he is entitled to have the sample supplied in the same manner as the article is being supplied to the public (*r*).

Production of authority.

26. An officer purchasing a sample for analysis is not bound to produce his authority unless the seller asks for it, nor is it a condition precedent to a subsequent prosecution that the officer should prove that he is acting under the direction of the local authority (*s*).

(*k*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 17; Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 5. Only the public officer has the compulsory power of taking samples, and he must pay the proper price for the article or quantity taken, except in the case of butter, when he may take a sample without payment (see p. 58, *post*). It is no offence against the Acts for a tradesman to refuse to sell to a private purchaser.

(*l*) *Farley* v. *Higginbotham* (1898), 42 Sol. Jo. 309. As to liability of master for acts of servant, see title MASTER AND SERVANT.

(*m*) *Horder* v. *Scott* (1880), 5 Q. B. D. 552; *Stace* v. *Smith* (1880), 45 J. P. 141; *Garforth* v. *Esam* (1892), 56 J. P. 521; *Macaulay* v. *Mackirdy* (1893), 3 White, 464; *Massey* v. *Kelso* (1902), 3 Adam, 622; *Farley* v. *Higginbotham*, *supra*; *Tyler* v. *Dairy Supply Co., Ltd.* (1908), 72 J. P. 132.

(*n*) *M'Hugh* v. *M'Grath*, [1894] 2 I. R. 78.

(*o*) See *Payne* v. *Hack* (1893), 58 J. P. 165.

(*p*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 18.

(*q*) See *Sandys* v. *Jackson* (1905), 69 J. P. 171; *Frew* v. *Gunning* (1901), 3 Adam, 339.

(*r*) *Soutar* v. *Kerr* (1907), 44 Sc. L. R. 462. On 26th February, 1894, the Local Government Board issued directions as to the taking of samples. The quantities are to be sufficient to enable the analysis to be properly made—in the case of milk, not less than 1 pint; butter, ¾ lb.; lard, ¾ lb.; coffee, ¾ lb.; spirits, ¾ pint. For further directions as to samples of butter and milk, see pp. 54, 64, *post*.

(*s*) *Payne* v. *Hack* (1893), 58 J. P. 165; *Hale* v. *Cole* (1891), 55 J. P. 376. It has been held in Ireland that when once an inspector has been appointed he may take proceedings at his own discretion, and without any special authorisation from the authority appointing him (*Connor* v. *Butler*, [1902] 2 I. R. 569).

An inspector or other officer cannot insist on taking a sample outside the district for which he is appointed (*t*).

Division of the sample.

27. A public officer (*a*) who has completed the purchase of an article with the intention of submitting it to analysis must forthwith, that is, at the moment of purchase or within a few minutes afterwards (*b*), notify to the seller (or to his agent selling the article) his intention to have it analysed by the public analyst (*c*), and must divide the article into three (*d*) parts, which must be then and there separated, each part being marked and sealed or fastened up in such manner as its nature permits. He must, if required to do so, deliver one of the parts to the seller or his agent, and must himself retain one of the parts for future comparison (*e*), and, if he deems it right to have the article analysed, he must submit the third part to the analyst (*f*). Such a notification of intention is a condition precedent to a prosecution, but no particular form of words is necessary, nor, indeed, are any words, if it is clear that the seller is made aware that the sample is taken for the purpose of analysis by an official person (*g*); but either expressly or by necessary implication there must be a notification, and an analysis must subsequently be made, if a

(*t*) *R.* v. *Smith*, [1896] 1 Q. B. 596; *McNair* v. *Cave*, [1903] 1 K. B. 24; see note (*s*) on p. 9, *ante*.

(*a*) A private person purchasing for consumption is not bound to comply with the requirements of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 14 (*Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181; *Buckler* v. *Wilson*, [1896] 1 Q. B. 43; *Enniskillen Guardians* v. *Hilliard* (1884), 14 L. R. Ir. 214). *Parsons* v. *Birmingham Dairy Co.* (1882), 9 Q. B. D. 172, and *Harris* v. *Williams* (1889), 6 T. L. R. 47, must be considered to be no longer law, so far as they relate to this point; but see, *contra*, *R.* (*Barry*) v. *Mahony*, [1909] 2 I. R. 490. Nor need the formalities be observed in the case of a prosecution for refusing to sell under the Act of 1875 (38 & 39 Vict. c. 63), s. 17 (see p. 13, *ante*) (*Clarkin* v. *M'Cartan* (1888), 22 I. L. T. 95); nor where the sample is taken from an article in course of delivery under the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3, and the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 14 (*Rouch* v. *Hall* (1880), 6 Q. B. D. 17; *Rolfe* v. *Thompson*, [1892] 2 Q. B. 196; *Morton* v. *Fyfe* (1896), 2 Adam, 174).

(*b*) *Parsons* v. *Birmingham Dairy Co.*, *supra*; *Somerset* v. *Miller* (1890), 54 J. P. 614. Where an inspector did not completely seal the retained part, but covered it with paper on return to the office, a metropolitan police magistrate held that the requirement as to sealing etc. "forthwith" had not been complied with (*R.* v. *Lewis* (1907), 71 J. P. (Journal) 616).

(*c*) For the appointment etc. of the public analyst, see p. 8, *ante*.

(*d*) If the sample is taken by an officer of the Local Government Board or of the Board of Agriculture and Fisheries under the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 2 (see p. 7, *ante*), he must divide it into four parts, one of which must be sent to the Board that appointed him.

(*e*) See p. 31, *post*.

(*f*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 14, as amended by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 13. This latter section was repealed by the Statute Law Revision Act, 1908 (8 Edw. 7, c. 49), but the repeal does not affect the amendment. The fact that an incorrect date is written upon the package containing the sample does not vitiate the proceedings (*Howe* v. *Knowles*, [1909] S. C. (J.) (61).

(*g*) *Wheeker* v. *Webb* (1887), 51 J. P. 661, in which *Barnes* v. *Chipp* (1878), 3 Ex. D. 176, *contra*, was explained and distinguished.

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prosecution is to follow, even though the seller admits that the article was adulterated (*h*).

Sealing.

Each of the parts into which the article is divided must be securely sealed up or fastened in a suitable receptacle, which must be so secured that the cover or cork or stopper cannot be removed and replaced without breaking the string or seal, and in order to support a conviction there must be a finding by the justices that the sample had been so sealed or fastened as to comply with the statutory requirements (*i*). Each part must be sufficient in quantity to enable a proper analysis to be made, but there is no need that they should be mathematically equal or identical (*k*). If the sample purchased is in separate receptacles, the contents of each receptacle must be treated as a separate article and divided, or, if the quantity be insufficient for that, the contents of all must be mixed together and the whole divided into three parts (*l*).

Delivery to the analyst.

28. It is not necessary that the purchaser should personally deliver the part to be submitted for analysis to the public analyst; he may hand it to another person for delivery (*m*); or, if the analyst does not reside within two miles of the residence of the purchaser, he may forward it by post in a registered parcel (*n*).

SECT. 6.—*Offences and Defences* (*o*).

SUB-SECT. 1.—*Injurious Mixtures.*

Mixing injurious ingredients with food.

29. Every person commits an offence who mixes, colours, stains, or powders, or orders or permits any other person to mix, colour, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health, and whether or not such ingredient or material is in itself injurious, with intent that the article may be sold in that state. An offence is also committed by any person who sells any such article so mixed,

(*h*) *Smart & Son* v. *Watts*, [1895] 1 Q. B. 219. No notification or other formality is necessary when the purchase is made by a private person.

(*i*) *McQuinn* v. *Richards* (1901), a case at North London Sessions, July, 1901; *Suckling* v. *Parker*, [1906] 1 K. B. 527. The Local Government Board have directed (26th February, 1894) that the division should be as nearly as possible into equal parts, that the parts should be placed in dry wide-mouthed stoppered bottles or earthenware jars, and that corks used should be new and sound.

(*k*) *Lowery* v. *Hallard*, [1906] 1 K. B. 398.

(*l*) *Mason* v. *Cowdary*, [1900] 2 Q. B. 419; *Smith* v. *Savage*, [1905] 2 K. B. 88.

(*m*) *Horder* v. *Scott* (1880), 5 Q. B. D. 552.

(*n*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 16, as amended by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 15. The regulations contained in the Post Office Guide (published quarterly) as to sending glass, liquids etc. by post should be consulted and complied with.

(*o*) In this section the offences dealt with are those of a general nature which are created by the Sale of Food and Drugs Acts (for an enumeration of which see note (*b*), p. 3, *ante*), and relate to adulteration of an article within the meaning previously given to that term (see p. 5, *ante*). Offences connected with the administration or enforcement of the Acts, and those relating to particular articles, will be treated under other sub-headings. See, as to "Administration," p. 7, *ante*; "Butter," "Cheese," and "Margarine," p. 53, *post*; "Milk," p. 63, *post*; "Procuring Samples," p. 12, *ante*; and "Warranties," p. 25, *post*.

coloured, stained, or powdered (*p*). An article will be deemed injurious to health if it is shown to be injurious to a substantial portion of the community (*q*).

Mixing injurious ingredients with drugs.

30. A person commits an offence who, except for the purpose of compounding (*r*), mixes, colours, stains, or powders, or orders or permits any other person to mix, colour, stain, or powder, any drug with any ingredient or material so as to affect injuriously the quality or potency of such drug, with intent that the same may be sold in that state, and a person also commits an offence who sells any such drug so mixed, coloured, stained, or powdered (*s*).

Defences.

31. It is a defence to proceedings in respect of the offences in regard to the sale of any article of food or of any drug mentioned in the two preceding paragraphs if the defendant shows to the satisfaction of the court that he did not know of the article of food or the drug sold by him being so mixed, coloured, stained, or powdered, and that he could not with reasonable diligence have obtained that knowledge (*t*). A master is therefore liable for the acts of his

(*p*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 3. In *Summers* v. *Grist* (1896), 60 J. P. 346, it was held at quarter sessions that it was an offence under this section to sell a 1 lb. bottle of peas containing three grains of sulphate of copper; but in *Friend* v. *Mapp* (1904), 68 J. P. 589, the court refused to disturb the finding of justices (in a case under s. 6 of the same Act) that an offence had not been committed by selling preserved peas adulterated with 0·00924 per cent. of sulphate of copper; see note (*a*) on p. 22, *post*, and *Hull* v. *Horsnell* (1904), 68 J. P. 591, where it was held that the justices must find that the article had been rendered injurious to health by the admixture of the particular ingredient in question. A finding that the article is injurious to a substantial portion of the community, *e.g.*, children and invalids, is sufficient (*Cullen* v. *McNair* (1908), 72 J. P. 376). Prosecutions under s. 3 are seldom brought, however, partly because of the difficulty of establishing that the article is injurious to health, a matter which may give rise to a diversity of medical opinion, and partly because the character of the offence often permits of proceedings under other provisions, when the question of injury to health does not arise, *e.g.*, under s. 6 of the same Act (see *Goulder* v. *Rook*, *Bent* v. *Ormerod*, [1901] 2 K. B. 290); see, also, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 555.

(*q*) *Cullen* v. *McNair*, *supra*.

(*r*) The words of the section are "except for the purpose of compounding as hereinafter described." The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), however, nowhere describes the process of compounding drugs or states what is meant by a compounded drug, unless s. 7 of that Act (see p. 23, *post*) can be regarded as containing such a description. It is perhaps doubtful whether a limited company can be prosecuted for an offence against s. 3 or s. 4 of that Act, since it may be argued that *mens rea* cannot be present in the case of a corporation; but it is submitted that such a company will come under these sections, at any rate so far as the infliction of a pecuniary penalty is concerned. See the judgments in *Pearks, Gunston, and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K. B. 1; and particularly that of CHANNELL, J., at p. 12). As to liability of corporations, generally, for criminal offences, see titles COMPANIES, Vol. V., p. 294; CORPORATIONS, Vol. VII., pp. 390, 391; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 234, 235.

(*s*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 4. As to penalty for an offence against either s. 3 or s. 4 of that Act, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 555.

(*t*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 5. The onus of proof of no *mens rea* is upon the defendant; it is not for the prosecution to prove that there was a guilty knowledge or such negligence as to infer such knowledge

SECT. 6. Offences and Defences.

servants either done in the ordinary course of business or in consequence of his failure to exercise proper supervision over them (*a*). It is not a defence that notice was given to the purchaser by means of a label, or otherwise, of the injurious nature of the article sold, except, possibly, in the case where the article is only injurious to a section of the community (*b*).

SUB-SECT. 2.—*Alteration of Article.*

Sale of food or drugs not of the proper nature, substance, and quality.

32. Subject to certain provisoes, no person may sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20 (*c*), which may be increased to £50 upon a second offence, and upon any subsequent conviction to £100, with, in certain cases, imprisonment (*d*). Proof of guilty knowledge is not necessary to establish the offence (*e*). It is sufficient to prove that the purchaser has not received the article he asked for or which he had a right to expect he would receive (*f*).

Responsibility of seller.

33. A person may be prosecuted under the above provision, although the facts would support a conviction under other provisions of the Sale of Food and Drugs Acts (*g*). A person is responsible for the unauthorised acts of his servant, even though he has expressly forbidden him to adulterate, and has taken precautions to prevent him doing so (*h*); and, while the offending servant may also be convicted as the actual seller, proceedings against the servant do not relieve the master from responsibility (*i*). The seller, too, is responsible for the unauthorised act of a stranger, if such act results in the purchaser getting an article not of the nature, substance, and quality demanded (*k*).

(*a*) It is a common law misdemeanour knowingly to permit a servant to mix unwholesome ingredients with an article of food intended for sale (*R.* v. *Dixon* (1814), 3 M. & S. 11; and see p. 35, *post*).

(*b*) See p. 24, *post*, and *Cullen* v. *McNair* (1908), 72 J. P. 376.

(*c*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6. For the provisoes referred to, see p. 22, *post*.

(*d*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51); s. 17; and see p. 33, *post*.

(*e*) *Betts* v. *Armstead* (1888), 20 Q. B. D. 771; *Pearks, Gunston, and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K. B. 1.

(*f*) "In a case under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, there is no need to consider how that which makes the article otherwise than of the nature, substance, and quality of the article demanded has got into it, but the question is whether in fact it is there to such an extent that the article is different in nature, substance, and quality" (*Goulder* v. *Rook, Bent* v. *Ormerod*, [1901] 2 K. B. 290, *per* Lord ALVERSTONE, C.J., at p. 296).

(*g*) *Goulder* v. *Rook, Bent* v. *Ormerod, supra; Beardsley* v. *Walton & Co.*, [1900] 2 Q. B. 1; *Dickins* v. *Randerson*, [1901] 1 K. B. 437.

(*h*) *Brown* v. *Foot* (1892), 56 J. P. 581; *Farley* v. *Higginbotham* (1898), 42 Sol. Jo. 309; compare, *contra*, *Kearley* v. *Tyler* (1891), 56 J. P. 72, a decision which must now be regarded as incorrect; see, also, *Houghton* v. *Mundy* (1910), 103 L. T. 60.

(*i*) *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181.

(*k*) *Parker* v. *Alder*, [1899] 1 Q. B. 20, where water had been added to milk during transit by railway without the knowledge or authority of and without

A joint stock company incorporated under the Companies Acts can be convicted of the offence (*l*).

It is not necessary that the article sold should be adulterated, as an offence may be committed if the article sold is wholly different from the article demanded by the purchaser, provided he is prejudiced, as where lard is sold for butter, chicory for coffee, savin for saffron, or tapioca for sugar (*m*).

Sale to prejudice of purchaser.

34. It is no offence to give a purchaser an article superior to that for which he asks, provided he is not prejudiced (*n*). The prejudice, however, is not confined to pecuniary prejudice, nor to prejudice arising from the consumption of unwholesome food, nor to prejudice or damage to the actual purchaser in the particular case (*o*). But there is prejudice whenever there is a sale of an article in such a state that an ordinary unskilled person would have been prejudiced if he had received it in response to his demand for an article of that denomination, although for some reason, peculiar to himself, the actual purchaser is not prejudiced (*p*). It is no defence to a prosecution to allege that the purchaser, having bought only for analysis, was not prejudiced by the sale (*q*).

Notice to purchaser.

35. A purchaser is not prejudiced if notice is given to him at the time of sale that the article sold to him is not of the nature, substance, and quality of the article he demands (*r*), so long as such notice is clear and unequivocal (*s*). Such notice may be given by verbal communication (*t*), by a printed notice displayed in the

any default or negligence on the part of the seller or any servant of his. "Assuming that the seller was entirely innocent morally, and had no means of protecting himself from the adulteration of this milk in the course of transit, has he committed an offence? I think he has" (*ibid.*, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 25). But compare proceedings under the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, and *Oatley* v. *Lemon* (1905), 69 J. P. 163); and see p. 28, *post*.

(*l*) *Pearks, Gunston, and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K. B. 1.

(*m*) *Knight* v. *Bowers* (1885), 14 Q. B. D. 845; *Sandys* v. *Rhodes* (1903), 67 J. P. 352; and see *Bundy* v. *Lewis* (1908), 99 L. T. 833, where it was held, on the facts, that there had been no sale to the prejudice of the purchaser though "paregoric substitute" had been sold instead of "paregoric."

(*n*) *Hoyle* v. *Hitchman* (1879), 4 Q. B. D. 233, *per* LUSH, J., at p. 240.

(*o*) For instance, an expert in foodstuffs on going into a shop may know at once that an article he sees there, and asks for, is not the article usually sold by that name, and, if he insists upon having it, he cannot be said to be prejudiced in the ordinary sense of the word.

(*p*) See *Pearks, Gunston, and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, *supra*.

(*q*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 2; and see *Hoyle* v. *Hitchman*, *supra*.

(*r*) *Sandys* v. *Small* (1878), 3 Q. B. D. 449; see also *Sandys* v. *Markham* (1877), 41 J. P. 52; *Horder* v. *Grainger* (1880), 44 J. P. 188; *Goldsmith* v. *Maddaford* (1882), 46 J. P. 44.

(*s*) See *Collett* v. *Walker* (1895), 59 J. P. 600, where a notice which simply described the article as "finest oleine cheese," and contained no explanation of the nature of oleine, was held insufficient. In *Souter* v. *Lean* (1903), 4 Adam, 280, it was held by the Scottish court that a notice on a milk can, "not guaranteed 3 per cent.," was not sufficient to protect the seller.

(*t*) *Higgins* v. *Hall* (1886), 51 J. P. 293; *Otter* v. *Edgley* (1893), 57 J. P. 457.

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shop (*a*), by a label on the package containing the article (*b*), or in any other manner which satisfies the court that the purchaser did know, as the result of information given by the seller, that the article was different (*c*). But a mere notice that articles sold in a shop are not of any guaranteed strength is not sufficient to bring the fact of dilution to the mind of the purchaser (*d*), and if the notice is intended to cover fraud on the part of the seller it will not protect him against conviction (*e*).

False representation.

36. Although a seller has, prior to the sale, made a false representation as to the article demanded, he does not commit an offence if he discloses to the purchaser, at the time of the sale, the true nature, substance, and quality of the article (*f*); but where a false representation is made, at the time of sale, it will be an offence, even though the purchaser must have known that the representation was untrue, and therefore was not deceived thereby (*g*).

It is not necessary that there should be any express representation at the time of sale that the article is not adulterated. If an article is asked for and something is handed over as that article, there is a representation that the article so sold is unadulterated (*h*).

Question of fact.

37. The question whether there has been a sale to the prejudice of the purchaser is one for the justices to decide, and in coming to a decision they are entitled to take into consideration facts within their own knowledge as to whether the article has been so adulterated as to constitute a fraud on a purchaser (*i*), and if they find that the article is so slightly adulterated as not to differ materially from the article ordinarily sold under that denomination they may dismiss the summons (*k*).

(*a*) *Gage* v. *Elsey* (1883), 10 Q. B. D. 518; *Palmer* v. *Tyler* (1897), 61 J. P. 389.

(*b*) As to notice by label, see, further, p. 24, *post*.

(*c*) See *Morris* v. *Johnson* (1890), 54 J. P. 612; and *Pearks, Gunston, and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K. B. 1. It is, perhaps, an open question whether the notice must, in fact, be definitely brought to the knowledge of the purchaser, if from the nature of the case or the circumstances a knowledge on his part of the nature, substance, and quality of the article sold can reasonably be assumed. See and compare *Pearks, Gunston, and Tee, Ltd.* v. *Houghton*, [1902] 1 K. B. 889; *Hayes* v. *Rule* (1902), 87 L. T. 133. As to an accidental omission to give notice, see *Wadd* v. *Brayley* (1887), 51 J. P. 423; and, for a case where, on the particular facts, it was held that the sale of a different article was not to the prejudice of the purchaser, see *Bundy* v. *Lewis* (1908), 99 L. T. 833.

(*d*) *Dawes* v. *Wilkinson*, [1907] 1 K. B. 278.

(*e*) *Liddiard* v. *Reece* (1878), 44 J. P. 233; *Horder* v. *Meddings* (1880), 44 J. P. 234; *Star Tea Co.* v. *Neale* (1909), 73 J. P. 511; and see p. 24, *post*.

(*f*) *Kirk* v. *Coates* (1885), 16 Q. B. D. 49.

(*g*) *Heywood* v. *Whitehead* (1897), 76 L. T. 781.

(*h*) *Fitzpatrick* v. *Kelly* (1873), L. R. 8 Q. B. 337; *Roberts* v. *Egerton* (1874), L. R. 9 Q. B. 494; and compare *Bundy* v. *Lewis*, *supra*.

(*i*) *R.* v. *Field, Ex parte White* (1895), 64 L. J. (M. C.) 158; *Shortt* v. *Robinson* (1899), 63 J. P. 295.

(*k*) Either on the merits or as a trifling offence under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16; see title MAGISTRATES. See, also, cases cited in note (*i*), *supra*; *Sandys* v. *Rhodes* (1903), 67 J. P. 352; *Friend* v. *Mapp* (1904), 68 J. P. 589. But it is not a trifling offence to add 10 per cent.

Whether the article sold is of the nature, substance, and quality of the article demanded is also a question of fact to be decided by the justices in each case (*l*), upon which they are also entitled to take into consideration facts within their own knowledge (*m*). The article need not be defective in all three respects, as a conviction may be supported on proof of deficiency in nature or in substance or in quality (*n*).

Standard of purity.

38. If a statutory standard of quality has been fixed for an article, *e.g.*, milk and cream (*o*), the article sold must not be inferior to such standard; and if the article demanded has some recognised standard of composition or quality, such as drugs contained in the British Pharmacopœia, the article sold must come up to that standard (*p*), unless, in the case of drugs, the court is satisfied that there is a recognised commercial standard for the article which differs from the standard prescribed by the British Pharmacopœia (*q*). The Pharmacopœia, however, should not be regarded as fixing a standard for any particular article, unless it clearly states what is the composition of the article (*r*). Standards have been fixed for butter and milk, and to some extent for spirits (*s*).

Where the article has no statutory or recognised standard, the court must fix its own standard upon the evidence before it (*t*),

of water to milk, unless the court finds that after the addition the milk was still of exceptionally good quality (*Banks* v. *Wooler* (1900), 64 J. P. 245).

(*l*) *Webb* v. *Knight* (1877), 2 Q. B. D. 530; *Pashler* v. *Stevenitt* (1876), 41 J. P. 136; *Goulder* v. *Rook*, *Bent* v. *Ormerod*, [1901] 2 K. B. 290; *Wolfenden* v. *McCulloch* (1905), 69 J. P. 228.

(*m*) *R.* v. *Field*, *Ex parte White* (1895), 64 L. J. (M. C.) 158; *Shortt* v. *Robinson* (1899), 63 J. P. 295.

(*n*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 2.

(*o*) Under the above provision a man may be convicted for selling a natural production in the state in which he gets it, *e.g.*, a farmer may be convicted under the section for selling milk deficient in fat, though in fact the milk sold was in the same state as it came from the cow; see *Smithies* v. *Bridge*, [1902] 2 K. B. 13, and other cases referred to at p. 65, *post*. For the sale of milk and cream and cases relating thereto, see p. 63, *post*. For the sale of butter, cheese, and margarine, see p. 53, *post*.

(*p*) *White* v. *Bywater* (1887), 19 Q. B. D. 582 (tincture of opium not prepared according to the standard of the British Pharmacopœia); *Dickins* v. *Randerson*, [1901] 1 K. B. 437 (mercury ointment not so prepared). "If a drug is to be found in the Pharmacopœia and if that drug is asked for, that drug must be supplied; and if it is not sold with the ingredients and in the proportions prescribed by the Pharmacopœia there is at least *primâ facie* evidence that what is sold is not of the nature, substance, and quality which was demanded" (*ibid.*, *per* PHILLIMORE, J., at p. 442); see, also, *Bundy* v. *Lewis* (1908), 99 L. T. 833.

(*q*) *Boots, Cash and Dispensing Chemists, Ltd.* v. *Cowling* (1903), 67 J. P. 195 (soap liniment).

(*r*) See *Hudson* v. *Bridge* (1903), 67 J. P. 186, where the British Pharmacopœia was held not to fix a standard for vinegar of squills by reason of its giving a recipe for making that article.

(*s*) See pp. 54, 64, 67, *post*.

(*t*) *Wilson and McPhee* v. *Wilson* (1903), 68 J. P. 175, where "old brandy" containing 65 per cent. of spirit not derived from grapes was held not to be "brandy"; *Pashler* v. *Stevenitt* (1876), 41 J. P. 136, where "gin" 44 degrees under proof was held not to be gin; *Roberts* v. *Leeming* (1905), 69 J. P. 417.

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bearing in mind that in such cases no offence is committed by selling a genuine article that is of a low quality, unless there is fraud on the part of the seller (*a*).

Exceptions.

39. No offence is committed (*b*)—

Necessary and harmless additions.

(1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, nor conceal the inferior quality thereof (*c*).

Proprietary medicines.

(2) Where the food or drug is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent (*d*).

Compounded articles.

(3) Where the food or drug is compounded as in the Act mentioned (*e*).

Unavoidable mixture.

(4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation (*f*). Whether the admixture was or was not unavoidable is a question to be determined on the evidence in each case; the onus of proof is upon the defendant, who can discharge it only by showing that all reasonable care was taken to prevent the access of a foreign ingredient, but it is *primâ facie* proof of adulteration that the

(*a*) *Hoyle* v. *Hitchman* (1879), 4 Q. B. D. 233, *per* LUSH, J., at p. 240; *Morton* v. *Green* (1881), 4 Couper, 457; and see cases cited in note (*i*), p. 20, *ante*. It has been held an offence under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, to mix milk with butter in order to increase the weight of the substance sold as butter, since by reason of the added milk the butter is not a genuine article but a spurious compound (*Pearks, Gunston, and Tee, Ltd.* v. *Knight, Same* v. *Van Tromp*, [1901] 2 K. B. 825; and see p. 53, *post*). Where an article has no statutory or recognised standard, a complaint charging an offence under s. 6 should set out specifically the loss sustained by the purchaser and the noxious effects of the alleged adulteration (*Wilson* v. *M'Cutcheon* (1902), 4 Adam, 34 (marmalade), a Scottish case). In *Smith* v. *Wisden* (1901), 66 J. P. 150, it was held that it was not an offence to sell marmalade containing 13 per cent. of glucose, which was not injurious to health, and had not been added fraudulently, but only to prevent fermentation and crystallisation.

(*b*) It is for the defendant to prove that he comes within any one of the exceptions (Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 24); see p. 32, *post*.

(*c*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6 (1). With respect to the addition of water to spirits, see p. 67, *post*.

(*d*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6 (2). The effect of this exception is to exclude proprietary medicines from the operation of the Sale of Food and Drugs Acts, for an enumeration of which see note (*b*), p. 3, *ante*. For the liability of the seller of such a medicine to a prosecution under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, see title TRADE MARKS. And as to the sale of medicines, see title MEDICINE AND PHARMACY.

(*e*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6 (3). This exception is superfluous, for if the food or drug is "composed of ingredients in accordance with the demand of the purchaser" (see *ibid.*, s. 7, which is the only section containing any reference to compounded articles of food or drugs, and p. 23, *post*), the article would clearly be of the nature, substance, and quality of the article demanded, and therefore no case could arise for a prosecution under s. 6; see *Beardsley* v. *Walton & Co.*, [1900] 2 Q. B. 1, *per* CHANNELL, J., at p. 4, and note (*r*) on p. 17, *ante*.

(*f*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6 (4).

extraneous matter is present in a larger proportion than is ordinarily found in the commercial article (*g*).

SUB-SECT. 3.—*Abstraction.*

Injurious abstraction.

40. No person may, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, nor sell any article so altered without making disclosure of the alteration (*h*). Knowledge of the alteration is not necessary in order to support a conviction of the seller (*i*), though in proceedings for abstraction against a person who was not the actual seller the evidence must suffice to raise a presumption that the abstractor contemplated the sale of the altered article. A bare notice of admixture will be no defence, but a notice or label clearly disclosing the nature of the alteration will protect the defendant, provided that the attention of the purchaser is called to it at the time of sale (*k*).

A special contract between seller and purchaser as to a reduction in price in respect of any deficiency in quality affords no defence (*l*).

SUB-SECT. 4.—*Compounded Articles.*

Compounded articles.

41. It is an offence to sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser (*m*).

(*g*) See *Warnock* v. *Johnstone* (1881), 4 Couper, 509; *Shortt* v. *Robinson* (1899), 63 J. P. 295; and *Goulder* v. *Rook*, *Bent* v. *Ormerod*, [1901] 2 K. B. 290. In order to support a conviction, however, the justices must find that the addition was not unavoidable (*Bosomworth* v. *Bridge* (1892), 36 Sol. Jo. 594).

(*h*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9. This section was specially aimed at the removal of cream from milk, as to which see p. 65, *post*. The penalty is the same as for an offence against s. 6 of the same Act; see p. 18, *ante*.

(*i*) *Pain* v. *Boughtwood* (1890), 24 Q. B. D. 353; *Dyke* v. *Gower*, [1892] 1 Q. B. 220; *Morris* v. *Corbett* (1892), 56 J. P. 649.

(*k*) In *Spiers and Pond* v. *Bennett*, [1896] 2 Q. B. 65, the following notice, to which the attention of the purchaser was directed, was held sufficient:—"Milk. Note. Spiers & Pond, Ltd., purchase all milk sold by them under a warranty of its purity and genuine quality, and take all possible precautions to ensure its supply to their customers in proper condition, but they are unable to guarantee it as either new, pure, or with all its cream, and (to meet the requirements of the Sale of Food and Drugs Act) do not therefore sell it as such." For other cases as to what is sufficient disclosure, see *Jones* v. *Davies* (1893), 57 J. P. 808; *Platt* v. *Tyler*, *Wright* v. *Tyler* (1894), 58 J. P. 71; compare *Petchey* v. *Taylor* (1898), 62 J. P. 360; *Attfield* v. *Tyler* (1893), 57 J. P. 357; *Star Tea Co.* v. *Neale* (1909), 73 J. P. 511. The question whether there has been a sufficient disclosure of the alteration is one of fact for the justices, and if there is evidence on which they can come to a decision, the High Court will not disturb it. As to labels, see, further, p. 24, *post*.

(*l*) *Fecitt* v. *Walsh*, [1891] 2 Q. B. 304.

(*m*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 7. The penalty is the same as for an offence against s. 6 of the same Act; see p. 18, *ante*. Proceedings in respect of compound food or compounded drugs may also be taken under s. 6 (*Dickins* v. *Randerson*, [1901] 1 K. B. 437; *Beardsley* v. *Walton & Co.*, [1900] 2 Q. B. 1). S. 7 seems to be largely, if not entirely, redundant, for it is difficult to imagine a case where the sale of an article which does not contain the demanded ingredients will not fall within the scope of s. 6. The provision is, perhaps, intended more specifically to cover the sale of such

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Notice by means of label.

42. In certain cases a seller may protect himself against liability (*n*), since no person is guilty of an offence in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article of food or drug he supplies to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article of food or drug, to the effect that the same is mixed (*o*). The label must be so written or printed that the notice of mixture given thereby is not obscured by other matter on the label (*p*), though it is not necessary that no other matter shall appear on the label (*q*).

No protection if fraud.

43. The justices must decide in every case whether the admixture has been made fraudulently, and once they have rightly, on the evidence, found fraud, a label cannot protect the seller (*r*). It is no defence for him to say that he sold the article just as he had received it from the manufacturers (*s*). But where there is no fraud, and the label complies with the statutory requirements, there is no need for the seller expressly to call the attention of the purchaser to the label (*t*), though it may be that in certain circumstances an omission to do so will raise a presumption of fraud which a seller may have difficulty in rebutting.

Contents of label.

44. It is not necessary that the label should state with what, or to what extent, the article of food or drug has been mixed; only a bare statement that the substance is a mixture is required, but it will be prudent that the statement should be so framed as clearly to bring home to the mind of a purchaser the fact of admixture (*u*).

articles of food as are sold under a recognised recipe or formula, and the dispensing of medical prescriptions; see also the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, and title MEDICINE AND PHARMACY.

(*n*) That is, to proceedings under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6 or 7. The protection does not extend to proceedings under s. 3 (p. 16, *ante*) or s. 4 of the same Act (p. 17, *ante*). Care must be taken to distinguish between the protection afforded by a label in a case of innocent admixture and the notice that must be given to a purchaser of the true nature of the article sold in order to prevent the sale being to the prejudice of the purchaser within the meaning of s. 6, which notice may be given in various ways; see p. 19, *ante*.

(*o*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 8. A label is only a protection in the absence of fraud (*Otter* v. *Edgley* (1893), 57 J. P. 457; *Jones* v. *Jones* (1894), 58 J. P. 653; *Star Tea Co.* v. *Neale* (1909), 73 J. P. 511).

(*p*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 12. Nothing in this section is to hinder or affect the use of any registered trade mark or of any label which was continuously in use for at least seven years before 1st January, 1900; but no trade mark can be registered which purports to describe a mixture unless it complies with the requirements of this section.

(*q*) Compare *ibid.*, s. 6 (2), as to a label on margarine or margarine cheese; and see pp. 56, 57, *post*.

(*r*) *Liddiard* v. *Reece* (1878), 44 J. P. 233; and see cases cited in note (*o*), *supra*.

(*s*) *Horder* v. *Meddings* (1880), 44 J. P. 234, *per* LUSH, J.

(*t*) *Jones* v. *Jones*, *supra*.

(*u*) See *Pope* v. *Tearle* (1874), L. R. 9 C. P. 499. In *Hayes* v. *Rule* (1902), 87

False description.

45. It is a distinct offence for a person wilfully to give a label with any article sold by him which falsely describes the article sold (*v*).

SECT. 7.—*Warranties.*

Written warranty as a defence.

46. If the defendant in any prosecution under the Acts (*w*), to which such a defence would be applicable, proves to the satisfaction of the justices or court (1) that he had purchased the article in question as the same in nature, substance, and quality (*x*), as that demanded of him by the prosecutor and with a written warranty to that effect; (2) that he had no reason to believe at the time when he sold it that the article was otherwise; and (3) that he sold it in the same state as when he purchased it, he is entitled to be discharged from the prosecution (*y*). In a prosecution in respect of margarine, a purchase with an invoice to the effect that the article was purchased as butter will afford the same protection as a written warranty (*z*).

Notice of defence.

47. Neither warranty nor invoice will be available as a defence unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of the warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and unless he has also sent a like notice of his intention to such person (*a*). If the warranty or invoice was given by a person resident outside the United Kingdom, it cannot be used

L. T. 133, a notice on the wrapper that "all butter sold here is milk-blended butter" was held sufficient to protect the seller. In *Pearks, Gunston, and Tee, Ltd.* v. *Houghton*, [1902] 1 K. B. 889, a notice printed on an inner label which was covered with an opaque wrapper was held insufficient.

(*v*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 27. The penalty is the same as for an offence against *ibid.*, s. 6; see p. 18, *ante*.

(*w*) For an enumeration of these Acts, see note (*b*), p. 3, *ante*. The warranty must be from the immediate seller to the actual seller (*Hargreaves* v. *Spackman* (1907), 72 J. P. 52, though CHANNELL, J., in that case said that possibly a transfer in writing of the benefit of a warranty might be sufficient to satisfy the statute). As to proceedings, see p. 29, *post*.

(*x*) For the meaning of this expression, see pp. 18 *et seq.*, *ante*.

(*y*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25. This section affords no defence to a charge of importing adulterated butter under the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (1) (b).

(*z*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 7; and see p. 62, *post*.

(*a*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (1). Where an original warranty has been indorsed with a supplementary warranty, the notice is not necessarily bad because it mentions the supplementary warranty only (*Farthing* v. *Parkinson* (1904), 68 J. P. 353). The exact words of the warranty need not be set out, provided its terms be clearly stated (*Irving* v. *Callow Park Dairy Co.*, *Bacon* v. *Same* (1902), 66 J. P. 804). Although the defence of warranty is expressed to be applicable "in any proceeding" under the Sale of Food and Drugs Acts, it is obvious that so wide an expression must be subject to some limitation, and probably the true test is found in the terms of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25, *supra*, and that the defence can be raised only where there has been a sale to a purchaser who asked for an article of a particular nature, substance, and quality. It is clear that a warranty would form no defence to a prosecution for refusing to sell to an officer under s. 17 of the same Act, or for refusing to give milk for analysis under the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 4, or for any offence created by the Sale of Food and Drugs Act,

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as a defence unless the defendant further proves that he had taken reasonable steps to ascertain, and did, in fact, believe in, the accuracy of the statement contained in the warranty or invoice (*b*).

What amounts to a warranty.

48. In determining whether or not a document amounts to a written warranty, the ordinary rules of law with regard to warranties are applicable (*c*). Thus, a warranty given after the contract of sale has been completed may be void for lack of consideration to support it (*d*), and so incapable of being relied on (*e*); but a warranty is not open to objection on the ground that it relates to goods not in existence when it was given (*f*), and it may thus extend to and be relied on in connection with future delivery of goods under a contract (*g*), always provided that there is something in writing to establish a connection between the article subsequently supplied and the warranty (*h*): the contract itself may supply the necessary written connection (*i*).

1875 (38 & 39 Vict. c. 63), s. 27; and in view of the provisions of s. 5 of the same Act it is difficult to see what object there could be in applying a warranty defence to cases arising under ss. 3 and 4 of that Act. The Margarine Act, 1887 (50 & 51 Vict. c. 29), as amended by the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), contains a distinct warranty section (see p. 62, *post*), and most, if not all, of the offences created by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), appear to be quite outside the scope of a warranty. Indeed, it would seem that the defence of a warranty can be raised properly only as a defence to prosecutions under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 7, the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 7, and, perhaps, the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 8. In *Elliot* v. *Pilcher*, [1901] 2 K. B. 817, BIGHAM, J., expressed an opinion that the defence did not apply to prosecutions under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 4, and 9. A defendant who successfully raises the defence of a warranty or invoice, and is accordingly discharged from the prosecution, cannot be ordered to pay the costs incurred by the prosecutor. The last sentences of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25, and the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 7, though they have not been expressly repealed, are rendered inoperative by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, which requires notice of the defence to be given as a condition precedent to the defence being raised.

(*b*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (3).

(*c*) For these in detail, see titles CONTRACT, Vol. VII., pp. 421, 435; SALE OF GOODS.

(*d*) See *Roscorla* v. *Thomas* (1842), 3 Q. B. 234.

(*e*) See p. 28, *post*.

(*f*) See *Watts* v. *Stevens*, [1906] 2 K. B. 323, where the doubt on this point expressed by DARLING, J., in *Robertson* v. *Harris*, [1900] 2 Q. B. 117, was explained and removed.

(*g*) *Ibid.*; and see *Farmers' Co.* v. *Stevenson* (1890), 55 J. P. 407.

(*h*) *Ibid.* The cases as to the necessity of the connecting link between the warranty and the particular goods supplied being in writing are somewhat difficult to reconcile. There is no difference as to a connection being necessary, and, as *Watts* v. *Stevens*, *supra*, was decided after a very full consideration of all the authorities, and has been mentioned with approval, though distinguished, in *Evans* v. *Weatheritt*, [1907] 2 K. B. 80, it may be taken that the law is that there must be some writing connecting the particular consignment with the warranty, but such connection may be found in the contract or warranty itself (see on this point: *Harris* v. *May* (1883), 12 Q. B. D. 97; *Laidlaw* v. *Wilson*, [1894] 1 Q. B. 74; and *Robertson* v. *Harris*, *supra*, and that the contrary decision in *Elliot* v. *Pilcher*, *supra*, and, perhaps, in *Bacon* v. *Callow Park Dairy Co.* (1902), 87 L. T. 70, 71, cannot now be regarded as good law).

(*i*) In *Evans* v. *Weatheritt*, *supra*, a dairyman agreed to purchase from a

The warranty need not be a separate document; if there was a contract in writing the terms of the contract may supply the warranty, and where goods are sold by description the buyer is entitled to treat that description as a warranty that the goods are of the quality described (*j*).

Invoice.

49. An invoice may amount to a warranty, as where it contains a statement that the article delivered is guaranteed pure, provided it can be regarded as the actual contract of sale (*k*), and so may a label attached to the article, if clearly intended and legally operative as a warranty (*l*).

Branded goods.

50. It is not sufficient merely to brand the article delivered with words denoting that it is warranted pure or to that effect; the goods must be sold with a warranty (*m*); but a verbal contract to give a warranty, made at the time of sale, may be perfected by a written warranty given between the time of the contract of sale and the delivery of the goods (*n*).

Sale by servants.

51. The warranty must be given to the person relying on it (*o*), but a defendant who is a servant of the person who purchased

company during twelve months the whole of the milk required for his dairy, and the contract contained a warranty by the company that all the milk supplied thereunder should be pure. It was held that the contract, expressly applying the warranty to all milk sold thereunder, was sufficient evidence in writing to connect the particular consignment in question with the warranty; see also *Draper* v. *Newnham* (1910), 74 J. P. 124, where the connection was held to be in the warranty. In *Rees* v. *Davis* (1908), 72 J. P. 375, a farmer under a warranty supplied milk to a wholesale dealer, who resold to a retailer under a contract for the supply of the milk as received from the farmer. The retailer, as agent for his vendor, received the milk at the railway station, where there was attached to the churn a label, addressed to the wholesale dealer, which said "warranted pure new and unskimmed milk." It was held that the label constituted a sufficient connection between the particular milk and the warranty in the retailer's contract, and that the latter was protected by such warranty; see, also, *Lewis* v. *Weatheritt* (1909), 73 J. P. 164.

(*j*) Sale of Goods Act, 1893 (57 & 58 Vict. c. 71), ss. 11 (1), 13. In *Wilson* v. *Playle* (1903), 67 J. P. 263, a contract "I agree to sell, but without accepting any responsibility after delivery, about 54 Imperial gallons of pure milk every day" was held to be a good warranty. It was held in *Laidlaw* v. *Wilson*, [1894] 1 Q. B. 74, that a written contract for the sale of "three tons Kilvert's pure lard for delivery to end of January" was a warranty, and that the word "warranted" need not be actually used; and in *Robertson* v. *Harris*, [1900] 2 Q. B. 117, a contract to sell a fixed number of gallons of milk weekly, "to be pure new milk," was held to be a warranty, though on another point the defence failed. It is submitted that so far as such cases as *Rook* v. *Hopley* (1878), 3 Ex. D. 209, and *Harris* v. *May* (1883), 12 Q. B. D. 97, decided that there was no warranty, they are not now good law.

(*k*) *Hawkins* v. *Williams* (1895), 59 J. P. 325, 533.

(*l*) *Irving* v. *Callow Park Dairy Co.*, *Bacon* v. *Same* (1902), 66 J. P. 804; but a label cannot be a warranty under the Acts if there was no antecedent contract, verbal or written or implied, that a warranty should be given (*Iorns* v. *Van Tromp* (1895), 59 J. P. 246. Compare, *contra*, *Lindsay* v. *Rook* (1894), 58 J. P. 735, which must now be regarded as of doubtful authority.

(*m*) *Elder* v. *Smithson* (1893), 57 J. P. 809.

(*n*) *Watts* v. *Stevens*, [1906] 2 K. B. 323. A contract to give a written warranty need not be in writing (*Irving* v. *Callow Park Dairy Co.*, *Bacon* v. *Same*, *supra*).

(*o*) *Hargreaves* v. *Spackman* (1907), 72 J. P. 52, where a warranty given by A.

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the article under a warranty or invoice may rely on the defence of warranty and invoice in the same way, and subject to the same conditions, as his employer or master could have done had he been the defendant, provided that the servant satisfies the court that he had no reason to believe that the article was otherwise than that demanded by the prosecutor (*p*).

Successive warranties.

52. The case of successive warranties, however, does not fall within the provisions of the Acts; thus, if A. sells to B. with a warranty, and B. re-sells to C. with a like warranty, though C., on being prosecuted for adulteration, rely successfully on the warranty from B., B. on being prosecuted for giving a false warranty cannot plead the warranty he received from A. (*q*).

Altered articles.

53. Any addition to or subtraction from the article, even if harmless, will prevent the defence of warranty applying (*r*): when a warranty is relied on, the defendant must show that the article was exactly as when purchased (*s*).

Appearance of warrantor.

54. The person by whom a warranty or invoice is alleged to have been given may appear at the hearing of the summons, and may give evidence; and the court may adjourn the hearing to enable him to do so (*t*).

Proceedings in respect of false warranty.

55. Where a defendant has successfully pleaded a warranty, proceedings may be taken against the person who gave the warranty relied on for the offence of giving a false warranty, since every person who, in respect of an article of food or drug sold by him, as principal or agent, gives to the purchaser a false warranty in writing is liable on summary conviction to a fine not exceeding £20 for the first offence, £50 for the second offence, and £100 for any subsequent offence, or in certain cases to imprisonment (*u*), unless he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true (*v*). Such a prosecution is, of course, not necessarily dependent upon previous proceedings against the retailer, but, where there have been such proceedings, and the

to B., who resold to C. without a warranty, was held not to protect C. "In order to raise the defence given by the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25, the purchaser must get a warranty from his vendor, and he must get it in writing" (*ibid.*, *per* CHANNELL, J., at p. 53).

(*p*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (4), superseding *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181, so far as it held that a warranty given to a master did not protect his servant.

(*q*) *Manners* v. *Tyler*, [1902] 1 K. B. 901.

(*r*) See *Jones* v. *Bertram* (1894), 58 J. P. 116; *Hotchin* v. *Hindmarsh*, *supra*.

(*s*) *Hennen* v. *Long* (1904), 68 J. P. 237, where the defendant had added a small quantity of preservative to milk. And see *Sanders* v. *Sadler* (1906), 71 J. P. 3, as to when a purchase is completed.

(*t*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (2).

(*u*) See p. 33, *post*.

(*v*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (6), and see *ibid.*, s. 17. The case of *Derbyshire* v. *Houliston*, [1897] 1 Q. B. 772, is not now effective. See *Oatley* v. *Lemon* (1905), 69 J. P. 163, as to when a defendant discharges the onus of proof.

defendant has been discharged, the subsequent proceedings against the warrantor may be taken either before the court of the place where the article was purchased for analysis or of the place where the warranty was given (*w*), subject to the qualification that the proceedings cannot be taken before the court of the place where the article was purchased for analysis unless the warranty was given to the person from whom the article was so purchased (*x*).

Time limit.

Proceedings against the original vendor for giving a false warranty must be commenced within six months from the date of the warranty (*a*).

Misapplication of warranty.

56. Every person who wilfully applies to an article of food or a drug, in any proceedings under the Acts, a certificate or warranty given in relation to any other article or drug, commits an offence against the Acts which may render him liable to a penalty not exceeding £20 for a first offence, £50 for a second offence, and £100 on a third or subsequent offence, or in certain cases to imprisonment (*b*).

SECT. 8.—*Proceedings against Offenders.*

Who may prosecute.

57. Any private purchaser of an article of food or a drug may take proceedings against an offender (*c*), and any person who has purchased or procured a sample for the purpose of submitting the same for analysis, and has caused an analysis to be made (*d*), may institute proceedings if he has complied with the necessary preliminary formalities (*e*), and has received from the analyst a certificate from which it appears that an offence has been committed (*f*).

Nature of proceedings.

58. The proceedings are for the recovery of the appropriate penalty (*g*), and are subject to the general provisions of the Summary Jurisdiction Acts (*h*).

Generally, the proceedings must be taken before justices in petty

(*w*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (5), which got rid of the effect of the decision in *R.* v. *Smith*, [1896] 1 Q. B. 596.

(*x*) *Manners* v. *Tyler*, [1902] 1 K. B. 901, and see p. 28, *ante*.

(*a*) *Whitaker* v. *Pomfret Brothers*, [1902] 1 K. B. 661; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; compare *Cook* v. *White*, [1896] 1 Q. B. 284.

(*b*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 27; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 17 (1), (2); and see p. 33, *post*. As to forgery, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 760.

(*c*) *Buckler* v. *Wilson*, [1896] 1 Q. B. 83. The person to be prosecuted is the seller himself (*Hiett* v. *Ward* (1894), 70 L. T. 374).

(*d*) When a sample had been taken by an officer of the Local Government Board or of Board of Agriculture and Fisheries, acting under the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 2, who had caused it to be analysed, and the result of the analysis had been communicated to the local authority, and proceedings had been taken by an inspector of that authority, it was held that such inspector was entitled to prosecute (*Connor* v. *Butler*, [1902] 2 I. R. 569).

(*e*) See p. 14, *ante*.

(*f*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20; and see p. 10, *ante*. Any person, even a common informer, is entitled to take proceedings for the offence of refusing to sell under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 17 (*Connor* v. *Butler*, *supra*; *Kenealy* v. *O'Keeffe*, [1901] 2 I. R. 39; *Lawler* v. *Egan*, [1901] 2 I. R. 589).

(*g*) As to penalties, see p. 33, *post*.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and Acts amending the same. See title MAGISTRATES.

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sessions having jurisdiction in the place where the article of food or the drug sold was actually delivered to the purchaser (*i*), or where the false warranty was given (*k*).

Time limit.

59. Where an article of food or a drug has been purchased from any person for test purposes, any prosecution under the Acts (*l*) in respect of the sale thereof must be instituted before the expiration of twenty-eight days from the time of the purchase (*m*). A prosecution is instituted when the complaint is made or the information laid (*n*).

The summons.

60. The summons issued upon the complaint or information must state particulars of the offence or offences alleged, and also the name of the prosecutor (*o*): a description of him by his official title is not sufficient (*p*). It is for the justices to decide whether the particulars are sufficient (*q*), and if a defendant objects to them as insufficient his proper course is to ask for an adjournment (*r*). The prosecution must not be in the name of the local authority, but in that of the officer or person who caused the analysis to be made (*s*).

Return day.

61. The summons must not be made returnable in less than fourteen clear days (*a*) from the date of service (*b*). The

(*i*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20; and see title COURTS, Vol. IX., pp. 76, 78.

(*k*) *R.* v. *Smith*, [1896] 1 Q. B. 596; but, as already stated, proceedings can be taken in certain cases before a court of the place where the article was purchased (see p. 29, *ante*).

(*l*) For an enumeration of the Acts so cited, see note (*b*), p. 3, *ante*.

(*m*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19 (1). This provision as to time is imperative; see *Dixon* v. *Wells* (1890), 25 Q. B. D. 249. It does not apply to a prosecution for giving a false warranty (*Cook* v. *White*, [1896] 1 Q. B. 284, a case under the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 10, now repealed). A defendant does not waive any irregularity in complying with the provisions of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19, by appearing under protest in order to raise the point; all the requirements of the section are imperative, and non-fulfilment thereof cannot be afterwards cured (*Batt* v. *Mattinson* (1900), 64 J. P. 615; and see *Dixon* v. *Wells*, *supra*, and *Pearks*, *Gunston*, *and Tee*, *Ltd.* v. *Richardson*, [1902] 1 K. B. 91).

(*n*) *Beardsley* v. *Giddings*, [1904] 1 K. B. 847; *Brooks* v. *Bagshaw*, [1904] 2 K. B. 798; and see *R.* v. *Willace* (1797), 1 East, P. C. 186. There may be a separate information in respect of each sample found to be deficient (*Fecitt* v. *Walsh*, [1891] 2 Q. B. 304). The analyst's certificate need not be set out in the complaint or information (*Wilson* v. *M'Laughlin* (1907), 44 Sc. L. R. 469).

(*o*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19 (2). The summons must be signed and issued by the justice before whom the complaint was made (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1; *Dixon* v. *Wells* (1890), 25 Q. B. D. 249).

(*p*) *Burns* v. *Williamson* (1897), 2 Adam, 308.

(*q*) *R.* v. *Wakefield* (1890), 54 J. P. 148; *Neal* v. *Devenish*, [1894] 1 Q. B. 544 (in this case *Barnes* v. *Rider* (1892), 57 J. P. 473, *contra*, was disapproved).

(*r*) *Neal* v. *Devenish*, *supra*. An adjournment will seldom be necessary in an ordinary case, since the analyst's certificate, which must be served with the summons, will give all reasonable information.

(*s*) *Connor* v. *Butler*, [1902] 2 I. R. 569; *Colquhoun* v. *Dumbarton Corporation* (1907), 44 Sc. L. R. 465.

(*a*) *McQueen* v. *Jackson*, [1903] 2 K. B. 163. As to Scotland, see *Dunlop* v. *Goudie* (1895), 1 Adam, 554.

(*b*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19 (2). A

day originally fixed in the summons for the appearance of the defendant is the return day, not the day of the actual hearing (*c*).

Service.

62. If the summons is against a limited company it must be served by being left at or sent to the registered office of the company; it is not good service to leave it with an assistant at one of the company's shops (*d*). A copy of any analyst's certificate obtained on behalf of the prosecutor must be served with the summons (*e*).

Analyst's certificate as evidence.

63. In any proceeding consequent upon an analyst's certificate, the production, at the hearing, of the certificate of the analyst is sufficient evidence of the facts therein stated, unless the defendant requires the analyst to be called as a witness (*f*); and at the hearing of the information in any proceeding under the Acts, the production by the defendant of a certificate of analysis by a public analyst in the prescribed form (*g*) is sufficient evidence of the facts therein stated, unless the prosecutor requires that the analyst be called as a witness (*h*). A copy of every such certificate produced by the defendant must be sent to the prosecutor at least three days before the return day (*i*), and if it be not so sent, the court may adjourn the hearing on terms (*k*).

If there is no evidence offered to contradict the certificate of the analyst, the magistrate ought to act on it (*l*), but it is competent for the opposite party to rebut by other evidence the statements contained in a certificate (*m*), even if the analyst is not called (*n*).

Production of sample.

64. At the hearing of any information in connection with a sample purchased or procured for analysis, the part of the article retained by the person who purchased the article (*o*) must be

summons may be issued and served after twenty-eight days from the purchase, if the information is laid within the twenty-eight days (*Brooks* v. *Bagshaw*, [1904] 2 K. B. 798).

(*c*) See *R.* v. *Leeds County Court* (*Registrar*) (1886), 16 Q. B. D. 691; see also *Bridge* v. *Adams* (1899), 63 J. P. 394 (a decision of a metropolitan magistrate).

(*d*) *Pearks, Gunston, and Tee, Ltd.* v. *Richardson*, [1902] 1 K. B. 91; and see the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116, and title COMPANIES, Vol. V., p. 83.

(*e*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19 (2).

(*f*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21. The procedure referred to in this section is only applicable where the prosecution is of the person from whom the sample was obtained. In proceedings in respect of a false warranty the certificate is not evidence, and the analyst must be called (*Tyler* v. *Kingham & Son, Ltd.*, [1900] 2 Q. B. 413; and see *R.* v. *Smith*, [1896] 1 Q. B. 596).

(*g*) That is, the form prescribed by the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 18 and Schedule, for which see p. 10, *ante*.

(*h*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 22 (1).

(*i*) As to the return day, see p. 30, *ante*.

(*k*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 22 (2).

(*l*) *Harrison* v. *Richards* (1881), 45 J. P. 552; *Elder* v. *Dryden* (1908), 72 J. P. 355; and compare *Macleod* v. *O'Neil* (1882), 4 Couper, 629.

(*m*) *Todd* v. *Cochrane* (1901), 38 Sc. L. R. 801.

(*n*) *Hewitt* v. *Taylor*, [1896] 1 Q. B. 287. In this case LINDLEY, L.J., said, at p. 289, "The certificate is sufficient only where there is no evidence to the contrary."

(*o*) See p. 15, *ante*, as to the division of and dealing with samples.

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produced (*p*), and the accidental loss of the retained part will not relieve the prosecutor from compliance with this condition (*q*). But the part need not be produced in a state capable of being analysed, and a conviction may be supported if there is a finding of fact by the justices that the retained part of the sample had been so sealed or fastened as to comply with the requirements of the statute (*r*), even though the part had deteriorated subsequently (*s*).

Sending sample to Government analyst.

65. The justices before whom any complaint is made, or the court before whom any appeal is heard (*t*), must, on the request of either party, cause any article of food or drug to be sent to the Commissioners of Inland Revenue for analysis, and may do so without any such request. The Commissioners must thereupon direct the Government analyst (*a*) to make the analysis, and give a certificate to such justices of the result of the analysis: this certificate of the Government analyst need not be in any special form, nor is it conclusive, but unless contradicted by other evidence the court will generally accept and act upon it (*b*). The expenses of such analysis will be paid by the complainant or defendant as the justices may by order direct (*c*).

Onus of proof.

66. Where the fact of an article having been sold in a mixed state has been proved, the defendant in any prosecution who desires to rely upon any exception or provision contained in the Act creating the offence must prove that the same covers his case (*d*).

Appeal.

67. A person who has been convicted summarily of any offence punishable under the Acts may appeal to the next general or quarter sessions of the peace (*e*).

(*p*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21.

(*q*) *Hutchison* v. *Stevenson* (1902), 3 Adam, 651 (a Scottish case, in which the bottle containing the retained portion had burst and therefore could not be produced at the hearing).

(*r*) *I.e.*, the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 14; see p. 15, *ante*.

(*s*) *Suckling* v. *Parker*, [1906] 1 K. B. 527.

(*t*) As to appeals, see the text, *supra*.

(*a*) The Government laboratory is in Clement's Inn Passage, Strand, W.C.

(*b*) See *Fyfe* v. *Hamilton* (1894), 1 Adam, 484; *Todd* v. *Cochrane* (1901), 38 Sc. L. R. 801 (both Scottish cases). In *Dargie* v. *Dunbar* (1884), 5 Couper, 409, it was held in Scotland that the opinion of the Government analyst, given in his certificate, was not evidence, but the decision is not likely to be accepted by an English court.

(*c*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 22, as amended by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 21.

(*d*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 24. The exceptions and provisions referred to are contained in ss. 5, 6, and 8 of that Act (see pp. 16 *et seq.*, *ante*), and s. 25 (see p. 25, *ante*) of the same Act, the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 6 (see p. 67, *post*), and the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20 (see pp. 25, *ante*). The defendant may tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly (Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21). For defences open to an accused person, see pp. 16 *et seq.*, *ante*.

(*e*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 23. Any appeal will be subject to the conditions and regulations contained in the

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68. The provisions of the Acts do not affect the power of proceeding by indictment, nor take away any other remedy against any offender, nor do they in any way interfere with contracts and bargains between individuals and the rights and remedies belonging thereto (*f*).

Other remedies.

SECT. 9.—*Penalties* (*g*).

69. Any penalty prescribed by the Sale of Food and Drugs Acts may be reduced or mitigated according to the decision of the justices (*h*). Every penalty imposed is recoverable in the manner prescribed by the Summary Jurisdiction Acts (*i*), subject to the special provisions hereinbefore mentioned which deal with proceedings against offenders (*k*).

Reduction of penalties.

70. Where, under any provision of the Sale of Food and Drugs Act, 1875 (*l*), a person guilty of an offence is liable to a fine which may extend to £20 as a maximum, he is liable for a second offence under the same provision to a fine not exceeding £50, and for any subsequent offence to a fine not exceeding £100 (*m*).

Subsequent offences.

71. Where, under any provision of any of the Acts (*n*), a person guilty of an offence is liable to a fine exceeding £50, and the offence, in the opinion of the court, was committed by the personal act, default, or culpable negligence of the person accused, that person may, if the court is of opinion that a fine will not meet the circumstances of the case, be imprisoned, with or without hard labour, for a period not exceeding three months (*o*).

Imprisonment.

72. Any person who wilfully obstructs or impedes an inspector or officer in the course of his duties under the Acts, or by any gratuity, bribe, promise, or other inducement prevents, or attempts

Obstructing officers.

Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) (Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6); see title MAGISTRATES. As to appeals in respect of the importation of margarine, see note (*k*), p. 55, *post*.

(*f*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 28; and see p. 3, *ante*. See also p. 4, *ante*, for the proviso to this section as to the recovery of penalties and costs as damages. See, generally, on this subject, title DAMAGES, Vol. X., pp. 326—328.

(*g*) The pecuniary penalties attached to the various offences created by the Acts (for an enumeration of which see note (*b*), p. 3, *ante*) are incidentally referred to in this title where the offences are mentioned. The maximum amount has been stated in each case.

(*h*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20.

(*i*) See title MAGISTRATES.

(*k*) See p. 29, *ante*. For the recovery by action of a penalty paid by an innocent party, see p. 4, *ante*.

(*l*) 38 & 39 Vict. c. 63.

(*m*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 17 (1). It must be noted that the increased fine can be inflicted only for a subsequent offence of a similar nature to the first. As to the adequacy of penalties, reference may be made to a Home Office circular letter to clerks to justices, dated 24th July, 1902.

(*n*) For an enumeration of the Acts so cited, see note (*b*), p. 3, *ante*.

(*o*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 17 (2). This provision will not, it would seem, be applicable in the case of the prosecution of a limited company (see *Pearks, Gunston, and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairy Co.*, [1902] 2 K. B. 1).

SECT. 9. Penalties.

to prevent, the due execution by such inspector or officer of his duty, will be liable, on summary conviction, for a first offence to a fine not exceeding £20, for a second offence to a fine not exceeding £50, and for any subsequent offence to a fine not exceeding £100, or in certain cases he may be imprisoned (*p*).

Application of penalties.

73. Every pecuniary penalty imposed and recovered must be paid, in the case of a prosecution by any officer, inspector, or constable of the authority who have appointed an analyst or agreed to an analyst acting within their district, to such officer, inspector, or constable, who must pay it over to the authority for whom he acts, and by them it must be applied towards the expenses of executing the Acts; but in any other prosecution the penalty must be paid and applied according to the law regulating the application of penalties for offences punishable in a summary manner (*q*).

SECT. 10.—*Expenses.*

Incidence of expenses.

74. The expenses of executing the Acts are borne in the City of London and the liberties thereof by the general rate raised by the Common Council (*r*); in a metropolitan borough by the general rate made by the borough council (*s*); in counties by the county rate; and in boroughs by the borough fund or rate (*t*). But quarter sessions boroughs, which contribute to the general county rate for general county purposes, are exempt from contributing towards the expenses of administering the Acts in the county (*u*), and the town council of any borough having under any general or local Act of Parliament, or otherwise, a separate police establishment, which is liable to be assessed to the county rate of the county within which the borough is situate, is entitled to be paid by the county council the proportionate amount contributed towards the expenses incurred by the county in the execution of the Acts by the several parishes and parts of parishes within such borough in respect of the rateable value of the property assessable therein, as ascertained by the valuation lists for the time being in force (*a*).

(*p*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), ss. 16, 17; and see *Hewson* v. *Gamble* (1892), 56 J. P. 534; *Taylor* v. *Nixon*, [1910] 2 I. R. 94. See also as to offences under the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), and the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 484, 710.

(*q*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 26. In *R.* v. *Titterton*, [1895] 2 Q. B. 61, it was held that this provision applied to penalties under the Margarine Act, 1887 (50 & 51 Vict. c. 29); and see p. 61, *post*. For the general law as to the application of penalties in summary cases, see title MAGISTRATES.

(*r*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 29; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), s. 16; City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 15.

(*s*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 29; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10.

(*t*) *Ibid.* As to the various rates, see titles LOCAL GOVERNMENT; METROPOLIS; RATES AND RATING.

(*u*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 152; and see title LOCAL GOVERNMENT.

(*a*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 9. As to valuation lists and rateable value, see title RATES AND RATING.

Part III.—Sale of Unwholesome Food.

SECT. 1.—*Common Law Offences.*

SECT. 1. Common Law Offences.

75. As the public health may be imperilled by the use of unwholesome provisions, it is an indictable misdemeanour at common law knowingly to give to any person unwholesome food which is not fit for man to eat, or to mix noxious ingredients with food intended for the use of man; and from the strictly legal point of view it is immaterial whether the offence is committed out of malice or from a desire of gain (*b*). To sell or expose for sale, or have possession of with intent to sell, diseased or unwholesome provisions is a common law nuisance, irrespective of the statutory penalties created by modern legislation (*c*), and if a person who eats diseased meat or unwholesome food thereby contracts disease of which he dies, the seller may be indicted for manslaughter, and convicted if the evidence shows that he sold the meat or food knowingly, or was guilty of gross negligence in the way of his trade by allowing the same to be sold for human food (*d*). Common law misdemeanour.

76. A person who sells an article of food on a representation that it is of a good or superior quality, knowing that it is bad or inferior, may be indicted for the offence of obtaining money by false pretences (*e*), but the representation must be as to some definite fact, and not merely general praise of the article offered for sale (*f*). False pretences.

SECT. 2.—*Statutory Offences.*

SUB-SECT. 1.—*In General.*

77. The statutory provisions dealing with the examination, seizure, and condemnation of diseased, or unsound, or unwholesome food in England, exclusive of the Administrative County of London (*g*), and in Wales, are contained mainly in the Public Health Act, 1875 (*h*), as amplified by the Public Health Acts Amendment Act, 1890 (*i*), and in regulations made under the Public Health Application of the Public Health Acts.

(*b*) See *R.* v. *Treeve* (1796), 2 East, P. C. 821: 4 Bl. Com. 162; and compare *R.* v. *Haynes* (1815), 4 M. & S. 214.

(*c*) *Shillito* v. *Thompson* (1875), 1 Q. B. D. 12. See, also, title NUISANCE.

(*d*) *R.* v. *Kempson* (1893), 28 L. J. 477. As to manslaughter generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 580. A meat salesman may be indicted and convicted for knowingly sending or exposing meat for sale in a public market as fit for the food of man, when in fact it is not so fit (*R.* v. *Stevenson* (1862), 3 F. & F. 106); and a carrier may be indicted and convicted for knowingly bringing to market meat that is unfit for human food (*R.* v. *Jarvis* (1862), 3 F. & F. 108); but guilty knowledge must be proved in all such cases (*R.* v. *Crawley* (1862), 3 F. & F. 109).

(*e*) *R.* v. *Abbott* (1847), 1 Den. 273; *R.* v. *Dundas* (1853), 6 Cox, C. C. 380; *R.* v. *Goss* (1860), Bell, C. C. 208.

(*f*) *R.* v. *Bryan* (1857), Dears. & B. 265; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 690.

(*g*) The Administrative County of London includes the City of London, as to both of which see p. 42, *post*.

(*h*) 38 & 39 Vict. c. 55, ss. 116–119; see, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) 53 & 54 Vict. c. 59, s. 28. This is an adoptive Act, and it is possible,

SECT. 2. Statutory Offences.

Act, 1896 (*k*), and the Public Health (Regulations as to Food) Act, 1907 (*l*).

Local authorities.

The powers under the Public Health Acts of 1875 and 1890 are exercised by the councils of boroughs, urban districts, and rural districts respectively, who act through the medical officers of health and the inspectors of nuisances whom they are bound to appoint (*m*).

Inspection of articles intended for food.

78. A medical officer of health or inspector of nuisances (*n*) may at all reasonable times (*o*) inspect and examine any article intended for the food of man (*p*) which is sold or exposed for sale (*q*), or deposited in any place (*r*) for the purpose of sale or of preparation for sale, within the district of the local authority (*s*). In boroughs

therefore, that in some towns and districts its provisions are not in operation. This Act, for the purpose of brevity, is sometimes referred to in this title as "the Act of 1890."

(*k*) 59 & 60 Vict. c. 19.

(*l*) 7 Edw. 7, c. 32. As to these regulations, which may extend to London, see p. 44, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) For these authorities, and the appointment of officers thereby, see titles LOCAL GOVERNMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION. The medical officer of health and the inspector of nuisances can, on their own initiative, examine and seize food which they deem to be unsound, but proceedings against the offender must be authorised by the local authority.

(*n*) The power to inspect and examine is personal to the medical officer of health and inspector of nuisances; it cannot be delegated to an assistant.

(*o*) What is a reasonable time is a question of fact. The time during which the premises are open for business purposes will ordinarily be deemed reasonable; and, presumably, a medical officer or inspector would not be justified, except in special circumstances, in demanding that premises should be opened at an unusual hour in order that he might examine articles of food deposited therein. As to Sunday being a reasonable time, see *Small* v. *Bickley* (1875), 39 J. P. 422.

(*p*) Unless the article is intended for the food of man there can be no offence against the sections of the Public Health Acts mentioned in note (*h*), p. 35, *ante*. A man may be in possession of diseased meat or any other unwholesome article, provided he can prove that it is not intended for human food, but the presumption is against him; see *Scott* v. *Alexander* (1890), 2 White, 471 (a Scottish case).

(*q*) As to what constitutes exposure for sale, see *Barlow* v. *Terrett*, [1891] 2 Q. B. 107. The expression means exposed to the view of a purchaser or possible purchaser; see also *White* v. *Yeovil Corporation* (1892), 61 L. J. (M. C.) 213.

(*r*) There must be an article of food in the place to justify an entrance for the purpose of inspection. The meaning of "place" is not confined to a building. A railway station has been held to be a place within the section (*Newton* v. *Monkcom* (1888), 58 L. T. 231). Under the somewhat similar provisions of the now repealed Nuisances Removal Act for England (Amendment) Act, 1863 (26 & 27 Vict. c. 117), s. 2, it was held that a yard at the back of a butcher's house, with a slaughter-house on one side, was a "place" (*Young* v. *Grattridge* (1868), L. R. 4 Q. B. 166), and, in Ireland, that diseased meat in a cart passing through the streets on the way from a slaughter-house to a preserved meat factory was rightly seized (*Daly* v. *Webb* (1869), 4 I. R. C. L. 309). As to the meaning of "deposited for sale," see *White* v. *Redfern* (1879), 5 Q. B. D. 15; *Wieland* v. *Butler-Hogan* (1904), 68 J. P. 310; and *Roberton* v. *McIlroy* (*Wm.*), *Ltd.* (1908), 72 J. P. (Journal) 27.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116, as amplified by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28. "The true view of s. 28 (1) of the Act of 1890 is that it extends the provisions of ss. 116 and 117 of the Act of 1875 to all articles intended for the food of man" (*Firth* v. *McPhail*, [1905] 2 K. B. 360, *per* Lord ALVERSTONE, C.J., at p. 305).

or districts that have not adopted the Act of 1890 (*t*) the right of inspection and examination is restricted to any animal (*u*), carcase, meat, poultry, game (*a*), flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, and intended for the food of man (*b*).

Seizure of inspected articles.

79. If on such inspection and examination the medical officer or inspector is of opinion that the article in question is diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize (*c*) and carry away the article in order to have it dealt with by a justice (*d*). It is not necessary that there should be any summons or notice to the owner of the article before seizure (*e*), and the article seized must be taken before a justice with all reasonable

(*t*) See note (*i*) on p. 35, *ante*.

(*u*) In *Moody* v. *Leach* (1880), 44 J. P. 459, a case at Portsmouth Quarter Sessions, the recorder held that the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116—119, applied to live as well as dead animals. In regard to foreign meat, and in relation to districts within Customs ports, the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28 (2), is now effective, whether adopted or not, by virtue of the Public Health (Foreign Meat) Regulations, 1908 (Statutory Rules and Orders, 1908, p. 79), art. VIII. (2), made under the Public Health (Regulations as to Food) Act, 1907 (7 Edw. 7, c. 32); see p. 44, *post*.

(*a*) As to what "game" includes, see Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 2, and title GAME, pp. 208, 209, *post*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116. Sale or intention to sell is essential in an offence under the Public Health Acts; a man who has unwholesome food in his possession, intended to be used as food by him and his family and servants, is not within the scope of these Acts (*Rendell* v. *Hemingway* (1898), 14 T. L. R. 456). The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116, creates only two offences, exposing and depositing (*White* v. *Redfern* (1879), 5 Q. B. D. 15). It will be seen that where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), has not been adopted a right to inspect and examine is not given if the article in question has been actually "sold," that is, presumably, if the property in the article has passed to the purchaser. It was probably in consequence of a decision that a butcher could not be made liable under the Public Health Act, 1875 (38 & 39 Vict. c. 55), in respect of meat that had been taken home by a purchaser that the amendment was made by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59) (see *Vinter* v. *Hind* (1882), 10 Q. B. D. 63). It is not clear what is the exact meaning to be put upon the expression "sold," but it is submitted that it extends the right to inspect and examine to any article that has been sold to a purchaser, whether it has or has not passed into the actual or constructive possession of the purchaser.

(*c*) To constitute seizure, there must be something more than a mere taking possession of the article, it must be a taking otherwise than on the invitation of the owner; where an owner draws the attention of an inspector to certain goods as being unsound there cannot be a seizure of the goods so far as that person is concerned; possession by permission is not seizure (see *Vinter* v. *Hind*, *supra*; *R.* v. *Dennis*, [1894] 2 Q. B. 458, C. C. R.).

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116. An assistant may seize and carry away the article by the direction of the medical officer or inspector. The Public Health Act, 1875 (38 & 39 Vict. c. 55), authorises seizure only when and at the time that the article is exposed etc. for sale; the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), extends the power of seizure to an article that has actually been sold (compare *Vinter* v. *Hind*, *supra*, and *Williams* v. *Narberth Sanitary Authority* (1882), *Times*, 7th December, with *Firth* v. *McPhail*, [1905] 2 K. B. 300, and *R.* v. *Dennis*, *supra*; and see note (*b*), *supra*).

(*e*) *White* v. *Redfern*, *supra*.

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speed, not necessarily on the day of seizure, but as soon thereafter as is practicable in the particular circumstances (*f*).

Condemnation.

80. When an article of food so seized is brought before a justice, either in or out of court, and it appears to him to be diseased, or unsound, or unwholesome, or unfit for the food of man, he must condemn it, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man (*g*). The justice is required only to inspect the article; and unless he thinks fit he need not hear the owner or any other person, nor receive any evidence tendered in defence of the soundness etc. of the article (*h*). He cannot at this stage inquire whether it was intended for the food of man, or was sold or exposed for sale, or deposited in any place for the purpose of sale (*i*).

In a town or district where the Act of 1890 has been adopted (*j*) a justice may condemn any article of food if satisfied, on complaint being made to him, that such article is diseased, unsound, unwholesome, or unfit for the food of man, although the same has not been seized in manner above stated (*k*).

Obstructing officer.

81. Any obstruction of a medical officer, or inspector, or his assistant, when carrying out his duties, may be punished on summary conviction by a penalty not exceeding £5 (*l*).

Proceedings against offender.

82. When an article of food has been condemned by a justice, the person to whom it belongs or did belong (*m*) at the time of sale or exposure for sale, or in whose possession or on whose premises it was

(*f*) Where meat was seized at 8.45 p.m. and condemned by the justice at 10.15 next morning, it was held that there had not been unreasonable delay (*Burton* v. *Bradley* (1886), 51 J. P. 118); but where meat was sold on a hot day in July and not seized and condemned until the next day, the court expressed an opinion that the condemnation was bad (*Williams* v. *Narberth Sanitary Authority* (1882), *Times*, 7th December). As to the seizure and condemnation of tuberculous meat, see Local Government Board Circular, dated 7th September 1904.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 117. Whether an article is fit or not fit for the food of man must be a matter of opinion for the justice, in forming which he may be guided by evidence if he thinks fit to hear it. In a case at Lincoln in 1873, Dr. Tidey, the well-known expert, stated that he considered every animal killed immediately before, or during, or immediately after parturition, to be unfit for food (see 37 J. P. 267).

(*h*) *White* v. *Redfern* (1879), 5 Q. B. D. 15; *Re Bater and Birkenhead Corporation*, [1893] 2 Q. B. 77, C. A.

(*i*) *Thomas* v. *Van Os* (1900), 64 J. P. 582.

(*j*) See note (*i*) on p. 35, *ante*.

(*k*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28 (2).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 118. No power of entry upon premises is expressly given to an officer, except on a search warrant (see p. 39, *post*), but refusal of admission will constitute obstruction under this section, unless such admission is unreasonably demanded (*Small* v. *Bickley* (1875) 39 J. P. 422).

(*m*) The person to whom the article belongs, or did belong, is not necessarily the person who has or had the custody of it at the time of exposure for sale (*Newton* v. *Monkcom* (1888), 58 L. T. 231); he is the person who has or had the beneficial right to dispose of the article. The words "belongs" and "did belong" and "time of exposure for sale" must be read together (*Firth* v. *McPhail*, [1905] 2 K. B. 300).

found (*n*), may be proceeded against summarily, either before the justice who has ordered the article to be destroyed or disposed of, or before any other justices having jurisdiction in the place, and on conviction may be fined any sum not exceeding £20 for every article so condemned (*o*), or may be imprisoned for a term of not more than three months (*p*). Proceedings for the recovery of penalties can be taken only by a person aggrieved or by the local sanitary authority (*q*). It is not essential to prove that the accused knew that the article was unsound or that it was upon his premises, since *mens rea* or criminal intent is not a constituent of the offence (*r*). The offence is committed if there is actual possession for sale as human food, and such possession may be by the defendant's shopman or servant (*s*).

Recovery of penalties.

83. The burden of proof that the subject-matter of the charge was not intended for the food of man, or was not sold or exposed for sale or deposited for the purpose of sale or of preparation for sale, rests upon the accused person (*t*), who may call evidence as to the purpose for which the article was intended or deposited, or as to its condition at the time of seizure or condemnation (*u*).

Onus of proof.

84. If a medical officer of health, or an inspector of nuisances, or any other officer of a local authority, has reason to believe that

Search warrants.

(*n*) A person in whose possession the article is found may be convicted under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 117, though he had not exposed it for sale, if there is evidence that he intended to do so (*Mallinson* v. *Carr*, [1891] 1 Q. B. 48, which was followed by the Irish King's Bench Division in *Cork Rural District Council* v. *Walsh*, *Same* v. *Desmond*, [1908] 2 I. R. 234, where *Firth* v. *McPhail*, [1905] 2 K. B. 300, was distinguished). It is submitted that the Act does not apply to a purchaser, but to the person selling or endeavouring to sell the article. As to what is possession, see *Cairns* v. *Linton* (1889), 2 White, 228, and *Dickson* v. *Linton* (1888), 2 White, 51 (Scottish cases).

(*o*) Each exposure of a piece of bad meat is a separate offence (*Re Hartley* (1862), 31 L. J. (M. C.) 232, *per* MELLOR, J., at p. 233). In proceedings under the Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 43 (2), a butcher was convicted of being in possession of ten pieces of diseased meat, all portions of one animal. It was held on appeal that he was liable to a penalty in respect of each piece of meat (*Kenn* v. *Bell*, [1910] S. C. (J.) 13).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 117. Persons aiding and abetting the sale or exposure of unsound food may be proceeded against under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5; but a veterinary surgeon who gives a certificate that meat is sound and healthy, and the meat is subsequently found to be unsound, cannot by reason of negligence in making his examination be convicted of aiding and abetting the offence of exposing the unsound meat for sale (*Callow* v. *Tillstone* (1900), 64 J. P. 823).

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253. As to complaint, summons, penalties, and procedure generally, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 251—253, and title MAGISTRATES.

(*r*) *Blaker* v. *Tillstone*, [1894] 1 Q. B. 345; *Firth* v. *McPhail*, *supra*; *Wieland* v. *Butler-Hogan* (1904), 73 L. J. (K. B.) 513, C. A.; *Hobbs* v. *Winchester Corporation*, [1910] 2 K. B. 471, C. A.; and compare the Irish case of *Re Smith and Belfast Corporation*, [1910] 2 I. R. 285.

(*s*) See *Dickson* v. *Linton* (1888), 15 Rettie (Justiciary Cases), 76.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116; and see *White* v. *Redfern* (1879), 5 Q. B. D. 15.

(*u*) *Waye* v. *Thompson* (1885), 15 Q. B. D. 342. Justices in order to convict must find that the article was (1) unfit for the food of man; (2) intended for sale; and (3) intended for the food of man (*Wieland* v. *Butler-Hogan*, *supra*

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there is kept in any building or part of a building any of the articles enumerated above (*v*), or, where the Act of 1890 has been adopted (*a*), any article which is intended for sale for human food, and which is diseased, unsound, or unwholesome, or unfit for such purpose, he may complain on oath (*b*) to any justice, who may grant a search warrant enabling the officer to enter the building, and search for, seize, and carry away the suspected article, in order that it may be dealt with by a justice. Any person obstructing the execution of a search warrant becomes liable to a penalty not exceeding £20, in addition to any other punishment to which he may be subject (*c*).

Seizure under the Towns Improvement Clauses Act, 1847.

85. In places in which the Towns Improvement Clauses Act, 1847 (*d*), is applicable, the inspector of nuisances, the officer of health, or other officer appointed for the purpose, may at all reasonable times, and with or without assistants, enter and inspect any building and place kept or used for the sale of butcher's meat or for slaughtering cattle, and examine whether any cattle or carcase is deposited there; and if any such is found which appears unfit for the food of man he may seize and carry it before a justice, who must order it to be further examined by competent persons. If on such examination it is found to be unfit for the food of man the justice must order it immediately to be destroyed or otherwise disposed of in such a way as to prevent it being exposed or used for the food of man.

The justice may order the person to whom the condemned animal or meat belongs or in whose custody it was found to pay a penalty not exceeding £10 for every animal, carcase, or part of a carcase so found, and any person obstructing the execution of this provision may be fined a sum not exceeding £5 (*e*).

Local bye-laws.

86. In many places the sale of unwholesome food is also regulated by local bye-laws made under the general powers conferred by the Municipal Corporations Act, 1882 (*f*), or the Local Government Act, 1888 (*g*), or under special powers contained in a local Act.

in which case *Mallinson* v. *Carr*, [1891] 1 Q. B. 48, was distinguished on the ground that there the defendant knew that the article was unsound).

(*v*) See p. 37, *ante*.

(*a*) See note (*i*) on p. 35, *ante*.

(*b*) Oath includes affirmation and declaration (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3).

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 119.

(*d*) 10 & 11 Vict. c. 34.

(*e*) *Ibid.*, s. 131. The section only applies to flesh meat. The magistrate who adjudicates upon the summons must be the magistrate who condemned the meat (*R.* v. *Thomas* (1901), 18 T. L. R. 71).

(*f*) 45 & 46 Vict. c. 50, s. 23; and see *Shillito* v. *Thompson* (1875), 1 Q. B. D. 12.

(*g*) 51 & 52 Vict. c. 41, s. 16 (1). Bye-laws may also be made under the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), which is incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167), but having regard to ss. 116—119 of the latter Act and to the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47, the Local Government Board have advised that such bye-laws are unnecessary (see Memorandum of the Board, dated 25th July, 1877). Under the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 15, a person who sells or exposes for sale any unwhole-

Compensation.

87. If an article of food is seized or condemned wrongfully, the person aggrieved may, where the seizure purported to be in pursuance of the provisions of the Public Health Acts, 1875 and 1890, recover compensation for any loss he has incurred by reason thereof, if he is not himself in default (*h*). He will be deemed to be in default if the meat was in fact unsound although he was not aware of the fact and could not have discovered it by reasonable precaution (*i*). The person aggrieved is entitled to recover from the local authority full compensation, which includes such damage as he has sustained by reason of the seizure or destruction of his goods, or in consequence of unsuccessful proceedings against him for a penalty. Thus, he may recover the value of the goods of which he has been deprived, the taxed party and party costs he has incurred in defending the unsuccessful proceedings, costs incurred by him in attending with witnesses on the occasion of the application for condemnation, and such a sum as represents loss of business owing to the wrongful seizure and condemnation. The extent to which he can recover the costs incurred by him in defending himself before the justices is doubtful (*j*).

The owner cannot refuse to take back articles seized which the justice has declined to condemn (*k*).

Any dispute as to the fact of damage or as to the amount of compensation must be settled by arbitration, or, if the sum claimed does not exceed £20, by a court of summary jurisdiction (*l*).

some meat or provisions in a market or fair is liable to a penalty not exceeding £5 and to forfeiture of the meat or provisions; see also title MARKETS AND FAIRS. In places where the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), has been adopted, the sale of milk likely to cause disease may be stopped under the provisions of that Act; see also pp. 63 *et seq., post;* and as to prevention of infection, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. For special provisions as to the sale of particular articles of food, see pp. 45 *et seq., post.*

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308. For compensation under the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. In *Ormerod* v. *Rochdale Corporation* (1898), 62 J. P. 153, BRUCE, J., at Manchester Assizes, allowed damages to be recovered against the defendants in respect of meat which was examined, seized, and destroyed by order of the medical officer without an order of a justice, but, in view of the later decision in *Stanbury* v. *Exeter Corporation*, [1905] 2 K. B. 838, it is difficult to accept the earlier case as good law, for it seems clear that a corporation is not responsible for the wrongful act of its servant acting in the performance of his statutory duties, over which they have no control.

(*i*) *Hobbs* v. *Winchester Corporation*, [1910] 2 K. B. 471, C. A.

(*j*) *Re Bater and Birkenhead Corporation*, [1893] 2 Q. B. 77, C. A.; *Davis* v. *Rhondda Urban District Council* (1899), 80 L. T. 696; *Barnett* v. *Eccles Corporation*, [1900] 2 Q. B. 423, C. A.; and see *Hobbs* v. *Winchester Corporation*, *supra*, in which case the decision in *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, C. A., was questioned. In a case under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 274, it was held that the damage for which compensation can be obtained must be actionable damage, and does not include trade loss by reason of the publication of the condemnation proceedings before the justices (*Re Smith and Belfast Corporation*, [1910] 2 I. R. 285).

(*k*) *Re Bater and Birkenhead Corporation, supra.*

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308; and as to arbitration, see *ibid.*, ss. 179—182; see also title LOCAL GOVERNMENT. For the law as to the importation of articles of food and drink, see p. 43, *post.*

SECT. 2. Statutory Offences.

SUB-SECT. 2.—*In London.*

Inspection and seizure etc. in London.

88. In the City of London or in any of the metropolitan boroughs a medical officer of health or sanitary inspector (*m*) has somewhat greater powers; he may at all reasonable times enter any premises and inspect and examine any animal (*n*) intended for the food of man which is exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, and any article, whether solid or liquid, intended for the food of man, and sold or exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale (*o*). The power of seizure and carrying away and the burden of proof are similar to those already mentioned (*p*). A justice may condemn any animal or article which has been seized or is liable to be seized (*q*). The person to whom the condemned animal or article belongs or did belong at the time of sale, exposure for sale, deposit for the purpose of sale, or preparation for sale, or in whose possession or on whose premises the same was found, is liable, on summary conviction, to a fine not exceeding £50 for every animal or article; or if the article consists of fruit, vegetables, corn, bread or flour, for every parcel thereof so condemned; or to imprisonment for not more than six months with or without hard labour (*r*). The defendant may claim to be tried by jury (*s*). If he has been convicted of a like offence within the previous twelve months, and the court finds that he committed both offences knowingly and wilfully, the court

(*m*) As to the appointment and powers of these officers, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 106, 107. In the City of London powers as to unsound food are administered by the Court of Common Council as the successors to the Commissioners of Sewers (City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.)). Elsewhere in London the administration is vested in the councils of the various metropolitan boroughs (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4). As to metropolitan local authorities, see title METROPOLIS.

(*n*) See note (*u*) on p. 37, *ante*. It will be noted that an express power of entry is given to an officer in London; he can, however, enter only in accordance with the provisions of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 115, 116, 117, 123. See, further, titles METROPOLIS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (1). The articles of food which may be inspected and seized in London are practically similar to the articles liable to inspection and seizure under the combined operation of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117, as extended by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28; see p. 36, *ante*.

(*p*) See pp. 37, 39, *ante*.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (2). As to the duty of the justice, see p. 38, *ante*, and *Thomas* v. *Van Os* (1900), 64 J. P. 582.

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (2). There cannot be a conviction under this sub-section unless the article was seized whilst in the defendant's possession or on his premises. If the goods are seized when in possession of a purchaser, the vendor should be prosecuted under sub-s. 3 (see p. 43, *post*) (*Billing* v. *Prebble* (1896), 66 L. J. (Q. B.) 180). A private person may prosecute for an offence under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (2), and so may a sanitary inspector without having been expressly authorised to take proceedings (*Giebler* v. *Manning*, [1906] 1 K. B. 709); see, also, note (*o*), *supra*.

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17 (1).

may order notice of the facts to be affixed for not more than twenty-one days to any premises occupied by him. To obstruct the affixing of such notice, or to remove, deface, or conceal the same, is an offence punishable by a fine not exceeding £5 (*t*), and if the convicted person is the occupier of a licensed slaughter-house his licence may be cancelled (*a*).

Where article seized purchased from another.

89. Where it is shown that any article liable to be seized, found in the possession of any person, was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned, the person who so sold the article is liable to be fined and imprisoned (*b*), unless he proves that at the time he sold it he did not know, and had no reason to believe, that it was in such condition (*c*). A vendor can be convicted under this provision only where the article is liable to be seized after it has got into the possession of the purchaser (*d*).

Compensation.

Compensation for improper seizure or condemnation can be recovered only by an action for damages.

Removal of unsound food.

90. If a person has in his possession any article which is unsound or unwholesome or unfit for the food of man he may, by written notice, require the sanitary authority to remove it as if it were trade refuse (*e*).

Port of London.

91. In the Port of London the regulations made under the Public Health (Regulations as to Food) Act, 1907 (*f*), apply.

Part IV.—Importation of Food.

Marked packages.

92. The importation into the United Kingdom of an adulterated or impoverished article of food (by which is meant an article that has been mixed with any other substance, or has had any part of it abstracted, so as in either case to affect injuriously its quality, substance, or nature, but not an article of food to which has been added only preservative or colouring matter of such a nature and in such quantity as not to render the article injurious to health)

(*t*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (4).
(*a*) *Ibid.*, s. 47 (5).
(*b*) As set out in s. 47 (2); see p. 42, *ante*.
(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (3).
(*d*) *R.* v. *Dennis*, [1894] 2 Q. B. 458, C. C. R. Nuts had been sold in bulk by the defendant on an express condition that the buyer would sort the contents and destroy the unsound portion before offering them for sale: the buyer did put aside the unsound nuts, and drew the attention of the sanitary inspector to them: it was held that the vendor could not be convicted, as the unsound nuts were not sold for the food of man. See, also, *Billing* v. *Prebble* (1896), 66 L. J. (Q. B.) 180, and *Grivell* v. *Malpas*, [1906] 2 K. B. 32.
(*e*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (8). For the removal of trade refuse, see *ibid.*, ss. 33, 141, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*f*) 7 Edw. 7, c. 32; see p. 44, *post*.

PART IV. Importation of Food.

may be made an offence in the case of any article of food designated by Order in Council, unless the same is imported in packages or receptacles conspicuously marked with a name or description indicating that the article has been so treated (*g*).

Liability of importer.

93. The person liable is the importer (*h*), and the penalty on summary conviction is for the first offence a fine not exceeding £20, for the second offence a fine not exceeding £50, and for any subsequent offence a fine not exceeding £100 (*i*), to which in certain cases imprisonment may be added (*k*). Proceedings for an offence relating to such importation can, however, be undertaken only by the Commissioners of Customs (*l*), who may take samples and procure their analysis by the principal chemist of the Government laboratories (*m*), whose certificate of the result of the analysis will be sufficient evidence of the facts stated therein, unless the defendant requires the person who made the analysis to be called as a witness (*n*).

Regulations as to importation.

94. The Local Government Board may make regulations for the prevention of danger to public health arising from the importation, preparation, storage, and distribution of articles of food or drink (other than drugs or water) intended for sale for human consumption. Such regulations may provide for the examination and taking of samples, and may apply, with respect to any matters dealt with by the regulations, any provision in an Act of Parliament dealing with the like matters, with the necessary modifications and adaptations. For the purposes of such regulations articles commonly used for the food or drink of man will be deemed to be intended for sale for human consumption unless the contrary is proved (*o*).

(*g*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (1) (d), (7). No Order in Council has yet been made exercising this power. For similar provisions as to the importation of butter, margarine, margarine cheese, milk, and cream, see pp. 55, 65, *post*.

(*h*) For definition of the expression "importer," see p. 6, *ante*.

(*i*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (1).

(*k*) *Ibid.*, s. 17 (2); and see p. 33, *ante*.

(*l*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (2). S. 1 has effect as if it were part of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), as to which see title REVENUE.

(*m*) As to Government laboratories, see p. 32, *ante*.

(*n*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (3), (4), (5). As to the form of the certificate, see *Foot* v. *Findlay*, [1909] 1 K. B. 1. A warranty cannot be raised as a defence to a charge of importing (*Kelly* v. *Lonsdale & Co.*, [1906] 2 K. B. 486).

(*o*) Public Health (Regulations as to Food) Act, 1907 (7 Edw. 7, c. 32), s. 1, extending the power of making regulations given by the Public Health Act, 1896 (59 & 60 Vict. c. 19). Presumably the regulations may make applicable the provisions of the Sale of Food and Drugs Acts as regards analysis and proceedings against offenders. Regulations have been made under this power as follows: Public Health (Foreign Meat) Regulations, 1908 (Statutory Rules and Orders, 1908, p. 790); Public Health (First Series: Unsound Food) Regulations, 1908 (Statutory Rules and Orders, 1908, p. 801); Public Health (Foreign Meat) Amending Regulations, 1909 (see Statutory Rules and Orders, 1909, p. 660, and circular letter of Local Government Board, 30th September, 1909).

95. In the interests of the revenue the importation of certain articles is either forbidden altogether, *e.g.*, extracts, essences, or other concentrations of malt, coffee, chicory, or tea, or only permitted in manner prescribed by the Customs Acts or Regulations, *e.g.*, spirits and wines (*p*). Prohibition.

Part V.—Particular Articles of Food (*q*).

SECT. 1.—*Beer.*

96. The sale of beer, besides being within the operation of the Sale of Food and Drugs Acts, is regulated in the interests of the revenue by various Acts relating thereto (*r*), and for that purpose the term "beer" includes ale, porter, spruce beer, black beer, and any other description of beer and any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time is found to contain more than 2 per cent. of proof spirit (*a*). Definition of beer.

97. A brewer of beer for sale must not adulterate beer nor add anything thereto (except finings for the purpose of clarification, or other matter or thing sanctioned by the Commissioners of Inland Revenue) before the same is delivered for consumption. Any beer found to be adulterated or mixed, except as aforesaid, in the possession of a brewer of beer for sale must be forfeited, and the brewer incurs a penalty of £50 (*b*). A similar prohibition and penalty attaches to a dealer in or retailer of beer, with the addition that he must not dilute beer (*c*). The use of saccharine, glucose, or invert sugar and sucramine in the manufacture and preparation for sale of beer is prohibited (*d*). Adulteration (i.) by brewer

(*p*) See Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42, and title REVENUE.

(*q*) Except where otherwise expressly indicated, the articles of food dealt with in this part come within the scope of the Sale of Food and Drugs Acts, and also within the ordinary laws relating to the sale of unwholesome food (see pp. 5 *et seq.* and pp. 35 *et seq.*, *ante*). They are, in addition, affected by special statutory provisions, which will now be considered. For restrictions affecting particular trades, generally, see titles FACTORIES AND SHOPS, Vol. XIV., pp. 433 *et seq.*; FISHERIES, Vol. XIV., pp. 569 *et seq.*; GAME, pp. 254 *et seq.*, *post*; INTOXICATING LIQUORS; PUBLIC HEALTH AND LOCAL ADMINISTRATION; TRADE AND TRADE UNIONS.

(*r*) See title REVENUE.

(*a*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 2, as extended by the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 4. "Botanic beer" has been held to be beer within this definition (*Howarth* v. *Minns* (1886), 51 J. P. 7, in which *Leah* v. *Minns* (1883), 47 J. P. 198, was doubted).

(*b*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 8 (1).

(*c*) *Ibid.*, s. 8 (2). The Act does not, however, prevent the sale to a customer by a publican of a glass of mixed beer—"half and half." It is directed against the manipulation of large quantities of beer in the publican's cellar, and not against the mixing of small quantities in a glass in the customer's presence (*per* HUDDLESTON, B., in *Crofts* v. *Taylor* (1887), 19 Q. B. D. 524).

(*d*) Treasury Orders made under the Customs and Inland Revenue Act, 1888

SECT. 1. Beer.

(ii.) by beer seller.

98. If a licensed beer seller is convicted of adulterating beer the conviction must be entered on the register of licences (*e*).

SECT. 2.—*Bread.*

Application of Acts.

The Bread Acts.

99. In addition to the general laws relating to adulteration (*f*) and the sale of unwholesome food (*g*), two statutes, known as the Bread Acts, 1822 and 1836 (*h*), relate specially to the preparation and sale of bread, the first applying within the City of London and the liberties thereof, within the weekly Bills of Mortality (*i*), and within ten miles of the Royal Exchange, while the second applies beyond those limits. The provisions of the two Acts are to a large extent identical; the few points of difference will be indicated in the following paragraphs. They apply only to persons who make or sell bread in the way of trade and to their servants (*k*).

Baking or selling on Sunday.

100. No master or mistress, journeyman, or other person exercising or employed in the trade or calling of a baker may make or bake any bread, rolls, or cakes of any sort or kind on a Sunday; and such persons may not after 1.30 p.m. on Sunday sell or expose for sale, nor permit nor suffer to be sold or exposed for sale, any bread, rolls, or cakes of any sort or kind, nor bake nor deliver, nor permit nor suffer to be baked or delivered, any meat, pudding, pie, tart, or victuals, nor in any other manner exercise the trade or calling of a baker or be engaged or employed in the business or occupation thereof, except so far as may be necessary in setting and superintending the sponge (*l*) to prepare the bread or dough for the following day's baking. A baker may, however, deliver bakings to his customers on Sunday up to 1.30 p.m. A conviction for transgressing these regulations must take place within six days from the commission of the offence, and the penalty varies from 10*s.* to 40*s.*, according to whether it is a first, second, or third, or subsequent offence. In default of payment and of sufficient distress the offender may be imprisoned, with or without hard labour, for periods varying from seven days to one month, unless the whole of

(51 & 52 Vict. c. 8), s. 5, and dated 17th May, 1888, 10th October, 1901, and 7th December, 1901.

(*e*) Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 14; Licensing Act, 1902 (2 Edw. 7, c. 28), s. 9, now repealed by the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), and re-enacted by *ibid.*, s. 50 (2); see title INTOXICATING LIQUORS.

(*f*) See pp. 5—34, *ante*.

(*g*) See pp. 35—43, *ante;* see, also, title FACTORIES AND SHOPS, Vol. XIV., pp. 458 *et seq.*, as to bakehouses and use of underground premises for baking purposes.

(*h*) 3 Geo. 4, c. cvi. (which applies to London), and 6 & 7 Will. 4, c. 37, in this title together usually referred to as "the Bread Acts." The stipendiary magistrate at East Ham held that the London Act applied to wholesale as well as retail transactions (see *R.* v. *Apostles' Bread Co.* (1907), 42 L. J. 651).

(*i*) The Bills of Mortality were weekly returns of deaths issued in the parishes of the City of London and in certain adjacent parishes in Middlesex and Surrey. They were discontinued in 1842.

(*k*) The Bread Acts do not apply to bread baked in a private house for private consumption, or made otherwise than for sale.

(*l*) The word "sponge," used in connection with baking, means the dough before it is kneaded and formed, when full of globules of carbonic acid gas generated by the yeast or leaven.

the penalty, costs, and expenses be sooner paid (*m*). Anyone may institute a prosecution, as the restrictions imposed by the Sunday Observation Prosecution Act, 1871 (*n*), do not apply to cases under the Bread Acts (*o*).

Component parts of bread.

101. A baker may make, and a seller of bread may sell or offer for sale, bread made of flour or meal of wheat, barley, rye, oats, buckwheat, Indian corn, peas, beans, rice, or potatoes; with common salt, pure water, eggs, milk, barm, leaven, potato, or other yeast, and mixed in such proportions as he thinks fit (*p*). He is not allowed to use any other ingredient whatsoever, and if he knowingly (*q*) uses any but the above-named ingredients, he, or any journeyman or servant offending, is liable to a penalty not exceeding £10, and in default of payment to imprisonment (*r*). The justices may also order the offender's name, place of abode, and offence to be advertised in a local newspaper, and may defray the expense of such publication out of the penalty (*s*).

(*m*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 16; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 14. The hour 1.30 p.m. must be ascertained according to Greenwich time (Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 91); and see title TIME.

(*n*) 34 & 35 Vict. c. 87, s. 1.

(*o*) *R.* v. *Mead*, [1902] 2 K.B. 212. For restrictions against trading on Sundays, see, further, title TIME. Baking puddings, pies, and such like things, for dinner on Sunday, is not an offence against the Sunday Observance Act, 1677 (29 Car. 2, c. 7); but baking bread in the ordinary course of business is (*R.* v. *Younger* (1793), 5 Term Rep. 449; *R.* v. *Cox* (1759), 2 Burr. 785). A baker can commit but one offence on the same day by exercising his ordinary calling on a Sunday contrary to the Sunday Observance Act, 1677 (29 Car. 2, c. 7), and in a case where a baker had been convicted under that Act on four charges of selling hot rolls on one Sunday, it was held that only the first conviction was legal (*Crepps* v. *Durden* (1777), 2 Cowp. 640; 1 Smith, L. C., 11th ed., 651).

(*p*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 2; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 2. Mixing alum with bread was at one time specially interdicted by stat. (1796) 36 Geo. 3, c. 22, s. 3, repealed by the Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101), and is now inferentially forbidden by the above-mentioned sections of the Bread Acts. As the addition of alum, by covering the use of inferior flour, may constitute a fraud on the purchaser, a prosecution will also lie under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6; and, if evidence is available that the alum has been added in such quantities as to be injurious to health, proceedings may be taken under s. 3 of that Act. An indictment will lie at common law for mixing alum with bread so as to make it noxious, though, as in the case of a prosecution under the Bread Acts, guilty knowledge on the part of the accused is an essential element (*R.* v. *Dixon* (1814), 3 M. & S. 11; and see *R.* v. *Treeve* (1796), 2 East, P. C. 821).

(*q*) To constitute an offence under the Bread Acts, guilty knowledge must be shown (*Core* v. *James* (1871), L. R. 7 Q. B. 135).

(*r*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 10; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 8; see *Core* v. *James*, *supra*, *per* HANNEN, J., at p. 138: "The meaning of s. 8 is that if the baker knowingly uses any forbidden ingredient he is liable to a penalty, and if his servant knowingly uses it the baker is responsible; but where there is an utter absence of knowledge, both upon the part of master and servant, it cannot be said that either of them uses the ingredient, for he does not know that it exists."

(*s*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 10; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 8. As to advertising names of offenders, compare the Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112), s. 3; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 14; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (4); see also title WEIGHTS AND MEASURES.

SECT. 2. Bread.

Adulteration of flour.

102. It is also an offence punishable by a penalty not exceeding £20 for any person to put into any corn, meal, or flour intended for sale any foreign ingredient or mixture, or knowingly to sell or offer or expose for sale, either separately or mixed, any meal or flour of one sort of corn or grain as the meal or flour of any other sort of corn or grain (*t*).

Search and condemnation.

103. Justices may by warrant authorise a search, at reasonable times in the daytime, on the premises of any miller, mealman, baker, or other person who shall grind grain, or dress or bolt meal or flour, or make bread for reward or sale, for the purpose of discovering and seizing any adulterated meal, flour, dough, or bread, or any mixture or ingredient intended to be used for the adulteration thereof. Any material seized is to be carried to the nearest resident justice with all convenient speed, and if the justice condemns it he may order the material to be disposed of as he thinks proper (*a*). An offender may be fined any sum not exceeding £10 for the first offence, with further penalties in case of a second or subsequent offence, and imprisonment in default of payment; and his name, place of abode, and occupation may be advertised in a local newspaper (*b*). To obstruct any such search or seizure is also an offence punishable on conviction by a penalty not exceeding £10 (*c*).

Common law offences.

104. In addition to the statutory offence, a baker who sells bread containing noxious or unwholesome materials is guilty of an indictable misdemeanour at common law (*d*), for there is an inference on the sale of bread, as of all food, that it is intended to be eaten by man (*e*). This inference may, of course, be rebutted by evidence that the bread was sold or delivered for some other purpose. The addition of the noxious substance need not necessarily be the personal act of the baker, for he is, in this connection, answerable for the misdeeds of his servant, if the servant was employed to use a material that might be dangerous (*f*).

Marking bread.

105. Bread made for sale either wholly or partially of peas or beans, or of any sort of corn or grain other than wheat, must be marked with a large letter M in Roman character; but the use of potato yeast in bread made of the meal or flour of wheat does not bring the bread within this regulation. The penalty for breach is a sum not exceeding 10*s*. for every pound weight of unmarked bread made for sale, or sold, or exposed for sale (*g*).

(*t*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 11; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 9. Prosecutions under the Bread Acts for adulteration are infrequent nowadays.

(*a*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 13; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 11.

(*b*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 14; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 12.

(*c*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 15; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 13.

(*d*) *R.* v. *Treeve* (1796), 2 East, P. C. 821; *R.* v. *Dixon* (1814), 3 M. & S. 11.

(*e*) *R.* v. *Dixon, supra;* and see p. 3, *ante*.

(*f*) *R.* v. *Dixon, supra.*

(*g*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 12; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 10.

106. Bakers or sellers of bread may make or offer for sale bread made of such weight or size as they think fit (*h*), but whatever is the weight or size of the loaf it can be sold only by weight (*i*), with one exception (*j*). Selling by weight means such a selling as informs the purchaser exactly how much bread he gets for a certain price (*k*). It is not legal to sell a 2*d.* loaf or a 6*d.* loaf by those designations without having regard to the weight of the loaf (*l*), or to sell a quartern loaf as such (*m*).

Sale by weight.

A baker or seller of bread who sells or causes to be sold bread otherwise than by weight is liable to a penalty not exceeding 40*s.* for every such offence (*n*), and he must, subject to a penalty of not less than 40*s.* and not more than £5, use the avoirdupois weight of sixteen ounces to the pound (*o*).

Penalties.

The bread must be actually weighed after baking and before sale (*p*). It is not obligatory upon the seller to weigh at the moment of sale, nor in the presence of the customer, unless requested by him so to do (*q*), but if the loaf is not weighed then or shortly before, as bread soon loses weight, there will be a presumption that it is not being sold by weight (*r*). The weight of the particular loaf or parcel of bread sold must be ascertained (*s*), but it is sufficient to ascertain that the weight is above the weight professed to be sold, without ascertaining the exact weight (*t*). The fact of a loaf being deficient in weight is *primâ facie* evidence that the bread has not been weighed, and throws upon the seller the burden of proving

When weighing must take place.

(*h*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 3; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 3.

(*i*) *Ibid.*, s. 4 of each Act. The magistrate at East Ham Police Court held that the section, as regards London, applied to wholesale as well as retail transactions (see *R.* v. *Apostles' Bread Co.* (1907), 42 L. J. 651). As to weights and measures, see title WEIGHTS AND MEASURES.

(*j*) See p. 51, *post.*

(*k*) *Jones* v. *Huxtable* (1867), L. R. 2 Q. B. 460; *London County Council* v. *Read* (1899), 63 J. P. 775; *Cox* v. *Bleines*, [1902] 1 K. B. 670.

(*l*) *London County Council* v. *Read, supra;* and see *Hill* v. *Browning* (1870), L. R. 5 Q. B. 453.

(*m*) *Jones* v. *Huxtable, supra.*

(*n*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 4; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 4.

(*o*) *Ibid.*, s. 5 of each Act. The penalty for a first offence may be reduced under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4; see title MAGISTRATES. As to weights generally, see title WEIGHTS AND MEASURES.

(*p*) *Jones* v. *Huxtable, supra; Williams* v. *Deggan* (1867), 16 L. T. 492; *Hill* v. *Browning, supra; Mattinson* v. *Bingley* (1908), 72 J. P. 346; and compare the Irish case of *Slater* v. *Brewsters*, [1905] 2 I. R. 258. It is not sufficient to weigh the dough before baking, and make an allowance for shrinkage or evaporation; what must be weighed is bread, not dough.

(*q*) *R.* v. *Kennett* (1869), L. R. 4 Q. B. 565; and see *Cox* v. *Bleines, supra, per* Lord ALVERSTONE, C.J., at p. 673.

(*r*) *Jones* v. *Huxtable, supra.*

(*s*) *Welch* v. *Cutler* (1905), 69 J. P. 149. In this case 2-lb. loaves had been weighed three at a time, and it was proved that each batch weighed 6 lbs. One of the loaves was found after sale to be half an ounce deficient. It was held that the weighing was not sufficient.

(*t*) *Cox* v. *Bleines, supra; Bridge* v. *Passman* (1903), 68 J. P. 129; *Houghton* v. *Buxton* (1907), 24 T. L. R. 200. The Acts are not meant to prevent people getting overweight (*Blackledge & Sons, Ltd.* v. *Bolshaw* (1908), 72 J. P. 383).

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that the bread was in fact weighed (*a*). The weighing must be made in view of the sale of the bread as of a particular weight: it is not sufficient, for instance, to weigh a loaf to see that it weighs at least $1\frac{3}{4}$ lbs., and then to sell it as a 2-lb. loaf (*b*).

Scales and weights.

107. Every baker or seller of bread must provide in a conspicuous part of his shop, on or near the counter, a beam and scales with proper weights, or other sufficient balance, in order that all bread there sold may be weighed in the presence of the purchaser (*c*). As the Bread Acts do not impose any penalty for an infringement of this provision, a neglect in this respect can only be punished as an indictable misdemeanour, and not summarily (*d*).

Using false weighing instruments may be punishable by a fine not exceeding £5 (*e*).

Sale from carts.

108. Every baker or seller of bread, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage (*f*), must be provided with and constantly carry in such cart or other carriage a correct weighing instrument (*g*), in order that all bread sold by him may be weighed in the presence of the purchaser, if the purchaser requests that the bread shall be so weighed. If this requirement is neglected, or if the weights are deficient, or if there is a refusal to weigh the bread on request made by or on behalf of the purchaser, the baker or seller of bread will be liable to a penalty not exceeding £5 for every offence (*h*).

(*a*) *Mitton* v. *Troke* (1869), 20 L. T. 563; *R.* v. *Kennett* (1869), L. R. 4 Q. B. 565.

(*b*) *Evans* v. *Jones* (1908), 72 J. P. 481.

(*c*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 8; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 6.

(*d*) *R.* v. *Smith* (1894), 58 J. P. 445; see also *Tyler* v. *Newman* (1908), 72 J. P. (Journal) 307, a case before justices. But compare *R.* v. *Kingsby* (1851), 15 J. P. 65, where it was held that the penalty imposed by the Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 7 (see note (*h*), *infra*), might be applied to an offence against s. 6 of the same Act for refusing to weigh in the presence of the customer.

(*e*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 8; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 6. Prosecutions may also be instituted under the Acts relating to weights and measures; see title WEIGHTS AND MEASURES.

(*f*) In the Bread Act (London), 1822 (3 Geo. 4, c. cvi.), which applies only to the metropolis (see p. 46, *ante*), the cart or other carriage aimed at by this provision is specially limited to those "drawn by a horse, mule, or ass"; so, in London, sale from a handcart, tricycle cart, or motor car will not be within the obligation as to carrying scales and weights.

(*g*) The expression "weighing instrument" includes scales, with the weights belonging thereto, scale-beams, balances, spring balances, steelyards, weighing machines, and other instruments for weighing (Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 35); and see Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 16), and title WEIGHTS AND MEASURES.

(*h*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 9; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 7; as amended by the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 32, and the Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 11. The amendment made by the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 32, only applies to a refusal to weigh on request (*Copeland* v. *Walker* (1891), 55 J. P. 809). The sections do not apply to delivery by basket (*Robinson* v. *Cliff* (1876), 1 Ex. D. 294, *per* DENMAN, J., at p. 298.

The master, and not the servant, is liable under this provision, which does not relieve the baker or seller of bread from his duty to sell by weight, and actually to weigh the bread before sale (*i*), the object of the provision being to ensure that there may be a second weighing on delivery to the purchaser, if it is required by him.

Where sale completed at shop.

If bread has been actually purchased at the baker's or seller's shop, and the loaves are weighed in the customer's presence and appropriated to the contract, and then, at the customer's request and to oblige him, sent in a cart to his house, it is not necessary that the cart should be provided with a weighing instrument (*k*).

Where sale not completed at shop.

But if the sale is not completed at the shop, as where a baker receives an order for bread, which he selects and weighs in the shop, and then sends out in a cart to the customer, the cart must carry the necessary scales and weights, as the object of the enactment is that the customer shall be afforded an opportunity of seeing the bread weighed (*l*).

French or fancy bread.

109. The only exception to the rule requiring bread to be sold by weight and not by denomination or value, is that a baker or seller of bread may sell bread usually sold under the denomination of French or fancy bread or rolls, without previously weighing it (*m*). The word "usually" relates to the time of sale and not to the date of the passing of the Act (*m*).

BRAMWELL, B., in this case, discussed the effect of the Bread Act, 1836 (6 & 7 Will. 4, c. 37), ss. 6, 7: he said that the Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 6, relates to bakers who keep shops, the earlier part of s. 7 relates to hawkers only, and the penal part of s. 7 applies to offences under both ss. 6 and 7. But compare *R.* v. *Smith* (1894), 58 J. P. 445, where it was held that the Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 9, could not be extended to provide a penalty for an offence under s. 8 of that Act; and see p. 50, *ante*, and *R.* v. *Kingsby* (1851), 15 J. P. 65, cited in note (d) thereon.

(*i*) See p. 49, *ante*.

(*k*) *Daniel* v. *Whitfield* (1885), 15 Q. B. D. 408. The bread is not then carried out or delivered by the vendor as "such baker or seller of bread"; the sale and appropriation has taken place at the shop, and the subsequent delivery is merely a matter of favour to a customer.

(*l*) *Robinson* v. *Cliff* (1876), 1 Ex. D. 294; *Ridgway* v. *Ward* (1884), 14 Q. B. D. 110. In the earlier case BRAMWELL, B., said, at p. 297, that no baker could safely deliver even one loaf without being provided with weights and scales at the time of delivery, even though the loaf had been weighed at the time of sale.

(*m*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 4; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 4. Any bread now or hereafter usually denominated French or fancy broad or rolls is within the exception, whether it was so known and sold in 1822 or 1836 respectively or not. On the other hand, the exception does not include bread, which, though usually sold as fancy bread at the date of the passing of either Act, does not at the time of the alleged offence come within that designation (*R.* v. *Wood* (1869), L. R. 4 Q. B. 559). There has been some doubt felt as to what is the exact position of the law on the construction of the word "usually" in the Bread Acts, but a careful consideration of the reported cases supports the proposition given in the text. *R.* v. *Wood*, *supra*, is an express decision that the proper test is what is known as fancy bread at the time of the transaction which is called in question. HANNEN, J., however, delivered a strong dissenting judgment (*ibid.*, at p. 563), in which he expressed the, perhaps, more logical view that the exception related only to bread usually sold as fancy bread etc. at the time of the passing of the Act and in the subsequent case of *Aërated Bread Co.* v. *Gregg* (1873), L. R. 8 Q. B. 355, BLACKBURN and ARCHIBALD, JJ., distinctly expressed their

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To come within the exception, the bread must be something that is not ordinary bread; it must be an article either of exceptional quality or of a different shape and appearance from ordinary bread, and must be of such a nature that a purchaser can see at a glance that it is not the ordinary loaf of commerce (*n*).

When, however, a customer asks for bread by weight the baker is bound to sell by weight, whether the bread is ordinary or French or fancy bread (*o*).

Obstructing execution of the Bread Acts.

110. A person resisting or making forcible opposition against any person employed in the due execution of either of the Bread Acts is liable to a penalty not exceeding £10 for every offence (*p*).

Penalties.

All penalties under the Acts may be levied by distress, with imprisonment in default for not more than one calendar month, with or without hard labour, unless otherwise directed by the Acts, or until the money be sooner paid (*q*). Half of any penalty may be given to the informer or person suing for and recovering the same (*r*), and the other half (or the whole if there be no informer) goes to the relief of the county or borough rate, as the case may be (*s*).

Time limit.

No person may be convicted under the Acts unless the complaint is made within forty-eight hours after the commission of the offence, or within such reasonable time as to the justice or justices shall seem fit, except in cases of perjury (*t*), and no person

concurrence with this view: *R.* v. *Wood* (1869), L. R. 4 Q. B. 559, was not, however, overruled, and not expressly dissented from, the point decided in that case not coming directly in question, and it must therefore be regarded as expressing the existing law on the point; see the judgment of WILLS, J., in *V. V. Bread Co.* v. *Stubbs* (1896), 60 J. P. 424.

(*n*) See *Aërated Bread Co.* v. *Gregg* (1873), L. R. 8 Q. B. 355. Loaves made of the same material as ordinary bread but baked separately, and not in a batch, are not French or fancy bread, nor does the fact that the bread is made by an improved process or with yeast of a superior quality (*V. V. Bread Co.* v. *Stubbs*, *supra*) make the loaf fancy bread. It must be something which to the eye is distinctly different from, and not liable to be confounded with, ordinary household bread by those who do not know the intricacies of the trade (*ibid.*, *per* WILLS, J., at p. 425). In giving judgment in *Aërated Bread Co.* v. *Gregg*, *supra*, QUAIN, J., said that the bread intended to be excepted from the necessity of weighing was bread made in small quantities in small shapes, either long rolls or round rolls or "crescents"; see also *Bailey* v. *Barsby*, [1909] 2 K. B. 610, where it was held that it was not essential that the bread should differ in quality from ordinary bread, if sold in a shape and size unmistakably different from an ordinary loaf. The object of the Bread Acts was to liberate the trade from the restrictions of the now repealed Assize Act (date uncertain), and to leave the baker at liberty to make bread of any size and shape he pleases, and to charge his own price for it. But in order to protect the customer from imposition the Bread Acts require the baker to sell by weight. He cannot sell at so much per loaf; he must sell at so much per pound, and the customer is to have so many pounds of bread, unless he chooses to have an article of exceptional quality, something that is not ordinary bread; and if he buys that, the baker is at liberty to sell it without reference to its weight (*R.* v. *Wood*, *supra*, *per* LUSH, J., at p. 562).

(*o*) *R.* v. *Kennett* (1868), L. R. 4 Q. B. 565.

(*p*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 18; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 16.

(*q*) *Ibid.*, s. 19 and s. 17 respectively.

(*r*) *Ibid.*, ss. 19, 32 and ss. 17, 32 respectively.

(*s*) *Ibid.*, s. 32 and s. 32 respectively.

(*t*) *Ibid.*, s. 31 and s. 31 respectively.

convicted under either Act can be prosecuted for the same offence under any other law (*a*).

An appeal against a conviction lies to the next court of quarter sessions (*b*). Appeal.

111. If any person who makes bread for sale, after being convicted of an offence under the Bread Acts and paying the penalty, proves that the offence was occasioned by or through the wilful act, neglect, or default of any journeyman or servant employed by him, such journeyman or servant may be ordered to make immediate payment to his master of such reasonable sum of money, as or by way of recompense, as the justices may think proper, and in default of payment may be imprisoned with hard labour for any term not exceeding one calendar month (*c*). Liability of servants.

112. No miller, mealman, or baker may act as a justice of the peace in any matter arising under the Bread Acts, under a penalty of £100, which may be recovered by a common informer (*d*). Interested party may not adjudicate.

113. The Bread Acts do not appoint any particular person or local authority to enforce their provisions, therefore proceedings thereunder must be taken by some individual who is either an aggrieved person or acts as a common informer. A local authority, being a corporate body, cannot sue as common informer for a penalty imposed by either Act (*e*). Enforcement of Bread Acts.

SECT. 3.—*Butter, Cheese, and Margarine.*

114. The statutes dealing with the manufacture, importation, and marketing of substitutes for butter and cheese are somewhat complicated and inter-relating, and in order to avoid repetition the various provisions are grouped together in the present section, which deals with the laws specially relating to butter, cheese, milk-blended butter, margarine, and margarine-cheese, and to premises where any of these substances are manufactured, or dealt in by way of trade. Special Acts relating to butter etc.

SUB-SECT. 1.—*Definitions* (*f*).

115. The word "butter" means the substance usually known as butter, made exclusively from milk or cream, or both, with or without salt or other preservative, and with or without the addition of colouring matter (*g*). "Butter."

116. The term "butter factory" means any premises on which by way of trade butter is blended, reworked, or subjected to any other treatment, but not so as to cease to be butter (*h*). "Butter factory."

(*a*) Bread Act (London), 1822 (3 Geo. 4, c. cvi.), s. 31; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 31.
(*b*) *Ibid.*, s. 27 and s. 25 respectively.
(*c*) *Ibid.*, s. 15 and s. 13 respectively.
(*d*) *Ibid.*, s. 17 and s. 15 respectively. As to courts of summary jurisdiction and appeals therefrom, see title MAGISTRATES.
(*e*) See *St. Leonard's, Shoreditch, Guardians* v. *Franklin* (1878), 42 J. P. 727.
(*f*) For other definitions, see see pp. 5 *et seq.*, *ante*.
(*g*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3.
(*h*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 1 (1) (a).

SECT. 3.
Butter, Cheese, and Margarine.

"Cheese."

117. The expression "cheese" means the substance usually known as cheese, containing no fat derived otherwise than from milk (*i*).

"Margarine."

118. The expression "margarine" means any article of food, whether mixed with butter or not, which resembles butter and is not milk-blended butter (*k*).

"Margarine-cheese."

119. The expression "margarine-cheese" means any substance, whether compound or otherwise, which is prepared in imitation of cheese, and which contains fat not derived from milk (*l*).

"Milk-blended butter."

120. "Milk-blended butter" is any mixture produced by mixing and blending butter with milk or cream other than condensed milk or cream (*m*).

SUB-SECT. 2.—*Standard of Purity.*

Power to make regulations.

121. The Board of Agriculture and Fisheries (*n*) may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine butter or cheese, or what addition of extraneous matter or proportion of water, in any sample of butter or cheese, or what proportion of any milk-solid other than milk-fat in any sample of butter or milk-blended butter, shall for the purposes of the Sale of Food and Drugs Acts (*o*) raise a presumption, until the contrary is proved, that the butter, cheese, or milk-blended butter is not genuine or is injurious to health (*p*), and an analyst must have regard to such regulations in certifying the result of an analysis under those Acts (*q*).

Limits of moisture.

122. When the proportion of water in a sample of butter exceeds 16 per cent., it will be presumed, until the contrary is proved, that the butter is not genuine by reason of the excessive amount of water therein (*a*).

(*i*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 25.

(*k*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 13 (1). In *Bayley* v. *Pearks, Gunston, and Tee, Ltd.* (1902), 66 J. P. 790, it was held that a mixture of butter and fresh milk was not margarine. Such a mixture will now come within the definition of milk-blended butter. As to the definition of margarine given in the now repealed portion of the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3, compare *Burton & Sons* v. *Mattinson* (1902), 66 J. P. 628, followed in *Roberts* v. *Leeming* (1905), 69 J. P. 417. A substance made entirely from vegetable products in imitation of butter is "margarine," and must be sold as such (*Wilkinson* v. *Alton* (1908), 24 T. L. R. 528).

(*l*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 25.

(*m*) Butter and Margarine Act, 1907 (7 Edw. 7. c. 21), s. 1 (1) (b).

(*n*) Sale of Food and Drugs Act, 1899 (62.& 63 Vict. c. 51), s. 4 (1); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*o*) For an enumeration of these Acts, see note (*b*), p. 3, *ante*.

(*p*) As to the operation of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, see pp. 18 *et seq.*, *ante*.

(*q*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 4 (1); Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 6. Any such regulations must be notified in the *London* and *Edinburgh Gazettes*, and made known in such manner as the Board directs (Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 4 (2)).

(*a*) Sale of Butter Regulations, 1902. The fact that a sample falls beneath or

If any butter which, when prepared for sale or consignment, contains more than 16 per cent. of water, is in any butter factory (*b*), or if any margarine which, when prepared for sale or consignment, contains more than 16 per cent. of water, is in any margarine factory, or if any such butter or margarine is consigned from a butter factory or margarine factory, the occupier of the factory or the consignor, as the case may be, is (whether the excess of moisture is due to adulteration or not) guilty of an offence, unless he proves to the satisfaction of the court that the butter or margarine was not made, blended, reworked, nor treated in the factory (*c*). In butter or margarine prepared for sale.

Any person who manufactures, sells, or exposes or offers for sale, or has in his possession for the purpose of sale, any milk-blended butter which contains more than 24 per cent. of water, is guilty of an offence (*d*). In milk-blended butter.

123. It is unlawful to manufacture, sell, expose for sale, or import any margarine, the fat of which contains more than 10 per cent. of butter fat (*e*). Butter fat in margarine.

SUB-SECT. 3.—*Importation.*

124. It is an offence to import into the United Kingdom the following articles: (1) Any margarine or margarine-cheese, except in packages conspicuously marked "Margarine" or "Margarine-cheese," as the case may require (*f*); (2) butter containing more than 16 per cent. of water; (3) margarine containing more than 16 per cent. of water, or more than 10 per cent. of butter fat; (4) milk-blended butter containing more than 24 per cent. of water; (5) milk-blended butter, except in packages conspicuously marked with a name approved by the Board of Agriculture and Fisheries (*g*); and (6) butter, margarine, or milk-blended butter which contains any prohibited preservative, or an amount of a preservative in excess of the allowed limit (*h*). Imported articles must be marked.

Where an importer (*i*) is convicted summarily (*k*) of any such offence the Commissioners of Customs may elect that instead of the prescribed penalty (*l*) the maximum fine shall be a fine equal to the Penalty.

exceeds the standard is not conclusive evidence of adulteration or that it is genuine. No regulations have yet been made as to the proportion of milk-solids other than milk-fat in a sample of butter or milk-blended butter.

(*b*) For definition, see p. 53, *ante*.

(*c*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 4 (1).

(*d*) *Ibid.*, s. 4 (2).

(*e*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 8. The defence of purchase as butter with a warranty is available (*ibid.*), as to which see pp. 25 *et seq.*, *ante*. As to penalties, see p. 62, *post*.

(*f*) As to marking, see pp 56 *et seq.*, *post*. The marking must be on the package itself and not on an attached label (Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 6 (1)).

(*g*) As to approved names, see p. 57, *post*.

(*h*) These limits are to be fixed by regulations. As to preservatives, see p. 60, *post*.

(*i*) For definition of "importer," see p. 6, *ante*.

(*k*) There is no right of appeal to quarter sessions (*R* v. *Otto Monsted, Ltd.*, [1906] 2 K. B. 456).

(*l*) See p. 62, *post*.

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value of the goods imported bearing the same mark or description, to be estimated and taken according to the rate and price for which goods of the like kind, but of the best quality, were sold at or about the time of the importation (*m*).

Prosecutions and evidence.

125. Prosecutions for these particular offences can only be undertaken by the Commissioners of Customs (*n*), and in any proceedings the certificate (*o*) of the principal chemist of the Government laboratories, or, if the person who made the analysis be called as a witness, the evidence of that person, that an imported substance is margarine or milk-blended butter raises a presumption, until the contrary is proved, that the substance is margarine or milk-blended butter. The defendant cannot require the actual analyst to be called as a witness unless he has at least three clear days (*p*) before the return day given notice to the prosecutor that he requires his attendance, and has deposited with the prosecutor a sum sufficient to cover the reasonable costs and expenses of the witness's attendance. The defendant, if he be convicted, must pay these costs and expenses (*q*).

Samples.

126. Samples may be taken in manner provided by the Sale of Food and Drugs Act, 1899 (*r*), and, if the principal chemist certifies a sample to be margarine or milk-blended butter, the Commissioners of Customs must, upon receiving the certificate, forthwith notify the importer thereof (*s*). It would seem that a warranty cannot be relied on as a defence to proceedings in respect of any of these offences (*t*).

Warranty.

SUB-SECT. 4.—*Marking.*

Regulations as to marking margarine etc.

127. Every person dealing in margarine or margarine-cheese, whether wholesale or retail, whether as manufacturer, importer, or as consignor or consignee, or as commission agent or otherwise, must conform to the following regulations :—

Every package, whether open or closed, and containing margarine or margarine-cheese (*a*), must be branded or durably marked "margarine" or "margarine-cheese," as the case requires, on the top, bottom, and sides of the package itself (*b*), in printed

(*m*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (1), as extended and varied by the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 5 (1), (2).

(*n*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (2); see pp. 29—34, *ante*, as to prosecutions and penalties generally, and the liability to imprisonment.

(*o*) This certificate need not follow the form prescribed by the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 18 and Schedule (*Foot* v. *Findlay*, [1909] 1 K. B. 1).

(*p*) For the meaning of "clear days," see title TIME.

(*q*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 5 (3).

(*r*) See pp. 12 *et seq.*, *ante*.

(*s*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 5 (4).

(*t*) See *Kelly* v. *Lonsdale & Co.*, [1906] 2 K. B. 486.

(*a*) It would seem that the provisions dealing with packages apply only to wholesale transactions, and the later provisions as to wrappers to retail sales, see *Bischop* v. *Toler* (1895), 73 L. T. 402.

(*b*) It is not sufficient if the brand or mark is solely on a label, ticket, or other

capital letters not less than three-quarters of an inch square; and if such margarine or margarine-cheese is exposed for sale (*c*) by retail (*d*), there must be attached to each parcel (*e*) thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, "margarine" or "margarine cheese."

Retail sales.

A person selling either article by retail save in a package so duly branded or durably marked must in every case deliver the same to the purchaser in a paper wrapper (*f*), on which is printed in capital block letters not less than half an inch long and distinctly legible, the word "margarine" or the words "margarine-cheese." No other printed matter must appear on the wrapper (*g*).

Approved names.

128. If in any wrapper inclosing margarine, or on any package containing margarine, or on any label attached to a parcel of margarine, or in any advertisement or invoice of margarine, a person dealing in margarine describes it by any name other than either "margarine," or a name combining the word "margarine" with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries and printed in type not larger than and in the same colour as the word "margarine," he commits an offence (*h*).

The Board is not to approve a name for use in connection with margarine if it refers to or is suggestive of butter or anything connected with the dairy interest (*i*).

thing attached to the package (Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 6 (1).

(*c*) If the article is concealed in such a way as not to be visible to a customer in the shop, it is not exposed for sale (*Crane* v. *Lawrence* (1890), 25 Q. B. D. 152); but it is not sufficient to merely cover it with paper. "Exposed for sale" is not limited to mean only "exposed for view" (*Wheat* v. *Brown*, [1892] 1 Q. B. 418).

(*d*) This does not apply to a sale at an eating-house or refreshment room for consumption on the premises (*Moore* v. *Pearce's Dining and Refreshment Rooms*, [1895] 2 Q. B. 657).

(*e*) As to the meaning of "parcel," see *Parkinson* v. *McNair* (1905), 69 J. P. 399; *Maguire* v. *Porter*, [1905] 2 I. R. 147; *McNair* v. *Horan* (1904), 68 J. P. 518; *Bischop* v. *Toler* (1895), 73 L. T. 402.

(*f*) The wrapper intended is presumably the outer wrapper if there are more than one. In *World's Tea Co.* v. *Gardner* (1895), 59 J. P. 358, it was held that to wrap a duly marked parcel of margarine in a second wrapper so as to conceal the marked wrapper, before delivery to a purchaser, was not an offence, but see *per* Lord RUSSELL OF KILLOWEN, C.J., and CAVE, J., in *Bischop* v. *Toler*, *supra*. As to the meaning of "wrapper," see *ibid.*

(*g*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), ss. 5, 6. The decisions in *Fyfe* v. *M'Laughlin* (1893), 1 Adam, 74, and *World's Tea Co.* v. *Gardner*, *supra*, are superseded by these provisions so far as they relate to the manner of marking. Margarine-cheese sold or dealt in otherwise than by retail may be itself conspicuously branded with the words "margarine-cheese" instead of being sold in a branded or marked package (Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 5).

(*h*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 8. It was held in *Williams* v. *Baker*, [1910] W. N. 280, that this section, which dealt with what might be printed "in" the wrapper, had not by implication repealed the provision of the Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 6 (2), that the word "margarine" and no other printed matter should appear "on" the wrapper.

(*i*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 10. See, as to fancy names before 1907, *Tanner* v. *Dyball* (1906), 94 L. T. 539; *Keeloma Dairy Co.* v. *Jones* (1906), 70 J. P. 533.

SECT. 3. Butter, Cheese, and Margarine.

Samples.

129. An officer authorised to take samples (*k*) under the Sale of Food and Drugs Act, 1875 (*l*), may, without going through the form of purchase provided by that Act (*m*), but otherwise acting in all respects in accordance with the provisions thereof as to dealing with samples (*n*), take for the purposes of analysis samples of any butter or cheese, or substances purporting to be butter or cheese, which are exposed for sale and are not properly marked "margarine" or "margarine-cheese" (*o*); and any such substance not being so marked is to be presumed to be exposed for sale as butter or cheese (*p*).

SUB-SECT. 5.—*Consignments.*

Goods in transit.

130. All margarine, margarine-cheese, and milk-blended butter, whenever forwarded by any public conveyance, must be duly consigned as margarine or margarine-cheese, or in the case of milk-blended butter under the name approved by the Board of Agriculture and Fisheries (*q*). Any officer of Customs or Inland Revenue or any medical officer of health, inspector of nuisances, inspector of weights and measures (except in the administrative county of London (*r*)), or police constable, authorised under the Sale of Food and Drugs Act, 1875 (*s*), to procure samples for analysis, may, if he has reason to believe that the above provision is being infringed, examine and take samples (*a*) from any package, and ascertain, if necessary by submitting the sample to be analysed, whether an offence has been committed (*b*). The person taking the sample must forward by registered parcel, or otherwise, a portion of the sample marked, and sealed, or fastened up, to the consignor if his name and address appear on the package containing the article sampled (*c*).

SUB-SECT. 6.—*Factories.*

Registration of premises.

131. Every manufactory of margarine or margarine-cheese, and any premises wherein the business of a wholesale dealer in margarine or margarine-cheese is carried on, and every butter factory (*d*), and any premises on which there is manufactured any

(*k*) As to authorised officers, see pp. 12, 13, *ante*.
(*l*) 38 & 39 Vict. c. 63.
(*m*) See p. 13, *ante*.
(*n*) See p. 15, *ante*.
(*o*) For the marking requirements, see p. 56, *ante*.
(*p*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 10; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 5.
(*q*) See p. 55, *ante*; see also p. 61, *post*.
(*r*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 12.
(*s*) 38 & 39 Vict. c. 63), s. 13; see p. 12, *ante*.
(*a*) As to taking samples and submission for analysis, see pp. 12 *et seq.*, *ante*.
(*b*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 8, as varied and extended by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 5, and the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), ss. 9 (3), 12. There is a like power to take samples in the case of imported substances (*ibid.*; and see pp. 12—16, *ante*).
(*c*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 10. As to dealing with samples generally, see p. 15, *ante*.
(*d*) For definition of "butter factory," see p. 53, *ante*.

milk-blended butter or on which there is carried on the business of a wholesale dealer in milk-blended butter, must be registered, by the owner or occupier thereof, with the local authority (*e*) from time to time in such manner as the Local Government Board may direct (*f*), and every such owner or occupier carrying on such manufacture in a manufactory, and every such wholesale dealer carrying on a business in premises, not duly registered, commits an offence (*g*). The fact of registration must be forthwith notified by the local authority to the Board of Agriculture and Fisheries (*h*).

Restrictions on use.

132. Premises must not be used as a butter factory if they form part of, or communicate otherwise than by a public street or road with, any other premises which are required to be registered under the Sale of Food and Drugs Acts, 1875 to 1907 (*i*). If any premises are so used the occupier thereof will be guilty of an offence (*k*), and the local authority (*l*) must remove the premises from the register of butter factories kept by them (*m*).

Occupier to keep register.

133. Every occupier of a manufactory of margarine or margarine-cheese or milk-blended butter, and every wholesale dealer in such substances, must keep a register showing the quantity and destination of each consignment of such substances sent out from his manufactory or place of business, which register must be open to the inspection of any officer of the Board of Agriculture and Fisheries. Failure to keep a register, or to produce it when required by such officer, or to keep it posted up to date, or the wilful making of an entry false in any particular, or a fraudulent omission to enter any required particular, will render the offender liable on summary conviction to a fine not exceeding £10 for the first offence, and not exceeding £50 for any subsequent offence (*n*).

(*e*) For definition of "local authority," see p. 6, *ante*.

(*f*) For regulations as to registration of manufactories of margarine or margarine-cheese, and of premises of wholesale dealers in those articles, see Order of Local Government Board as to Registration of Margarine Factories etc., dated 26th February, 1900 (Statutory Rules and Orders Revised, Vol. I., Adulteration, p. 11). For regulations as to registration of butter factories, manufactories of milk-blended butter, and of premises of wholesale dealers in milk-blended butter, see Order of Local Government Board, dated 28th December, 1907 (Statutory Rules and Orders, 1907, p. 1).

(*g*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 9, as extended by Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 7 (1), and Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 1 (1). For penalties, see p. 62, *post*.

(*h*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 7 (5).

(*i*) As to what Acts are included, see p. 3, *ante*.

(*k*) As to penalties etc., see p. 62, *post*.

(*l*) For definition of local authority, see p. 6, *ante*.

(*m*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 1 (3). This sub-section does not apply to premises which on 1st January, 1907, were being used as a butter factory and formed part of or communicated with premises which were then registered under the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), if and so long as the Board of Agriculture and Fisheries so direct (*ibid.*). For registration, see *infra*.

(*n*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 7 (1), (3); Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 1 (2). For imprisonment in addition to a penalty, see p. 33, *ante*; as to penalties for obstructing or impeding an officer, see p. 33, *ante*. The power to inspect the register includes a right to take notes therefrom, and an occupier or dealer who refuses to allow

SECT. 3.
Butter, Cheese, and Margarine.

Inspection of factories.

134. An officer of the Board of Agriculture and Fisheries or of the Local Government Board may enter at all reasonable times any registered premises and inspect any process of manufacture, blending, reworking, or treatment used therein, and may take samples for analysis of any butter, margarine, margarine-cheese, milk-blended butter, or of any article capable of being used in the manufacture, treatment, or adulteration of any such article (*o*).

An officer of a local authority who is authorised to procure samples (*p*), if specially authorised in that behalf by the local authority, has the like powers of entry, inspection, and sampling as regards any premises registered with the authority as a butter factory (*q*).

Power of entry.

135. If the Board of Agriculture and Fisheries have reason to believe that on any unregistered premises there is carried on any process of manufacture, blending, reworking, or treatment, or any wholesale dealing which, under the Sale of Food and Drugs Acts, cannot be carried on except on registered premises, or that on any premises butter is by way of trade either made or stored, and that for the purposes of those Acts inspection is desirable, the Board may authorise specially any officer of the Board to enter the premises, and in such case the officer has the like powers of entry, inspection, and sampling as if the premises were registered (*r*).

Production of authority.

Where a special authority is required, an officer of the Board or of a local authority is not entitled to exercise any of the aforesaid powers unless, if so requested by or on behalf of the occupier of the premises to be entered, he produces his authority (*s*).

Prohibition of adulterants.

136. If any substance intended to be used for the adulteration of butter is found in any butter factory, the occupier of the factory will be guilty of an offence, and if any oil or fat capable of being so used is found it will be deemed to be intended to be so used, unless the contrary is proved (*t*).

SUB-SECT. 7.—*Use of Preservatives.*

Regulations as to preservatives.

137. The Local Government Board may, after such inquiry as they deem necessary, make regulations for prohibiting the use as a preservative of any substance specified in such regulations in the manufacture or preparation for sale of butter, margarine, or milk-blended butter, or for limiting the extent to which, either generally or as regards any particular substance or substances, preservatives may be used in the manufacture or preparation for sale of butter, margarine, or milk-blended butter (*a*).

an officer to take such notes may be convicted of refusing to produce the register (*Hart* v. *Cohen and Van der Laun* (1902), 4 F. (Ct. of Sess). 445, a Scottish case).

(*o*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 2 (1).
(*p*) As to authorised officers, see p. 12, *ante*.
(*q*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 2 (2).
(*r*) *Ibid.*, s. 2 (3).
(*s*) *Ibid.*, s. 2 (4).
(*t*) *Ibid.*, s. 3.
(*a*) *Ibid.*, s. 7 (1). No such regulations have yet been made. Any regulations so made must be notified in the *London Gazette*, and must also be made

SECT. 3. Butter, Cheese, and Margarine.

Any person who manufactures, sells, or exposes or offers for sale, or has in his possession for the purpose of sale, any butter, margarine, or milk-blended butter which contains a preservative prohibited by a regulation, or an amount of a preservative in excess of the limit allowed by any such regulation, is guilty of an offence (*b*). Breach of regulations.

SUB-SECT. 8.—*Sale of Milk-blended Butter.*

138. Milk-blended butter can be dealt with only under such name or names as may be approved by the Board of Agriculture and Fisheries and under the conditions applicable to the sale or description of margarine, with the substitution of an approved name for the word "margarine," and with this modification, that in any case where, in order to comply with those conditions, the article is delivered to the purchaser in a wrapper, there shall, in addition to the approved name, be printed on the wrapper, in such manner as the Board approve, such description of the article, setting out the percentage of moisture or water contained therein, as may be approved by the Board (*c*). Regulation of sale.

The Board of Agriculture and Fisheries is not to approve a name under which milk-blended butter may be imported or dealt with if such name refers to or is suggestive of butter or anything connected with the dairy interest (*d*).

SUB-SECT. 9.—*Proceedings and Penalties.*

139. All proceedings under the Margarine Act, 1887 (*e*), or the Butter and Margarine Act, 1907 (*f*), are, unless otherwise provided by those Acts, to be the same as prescribed by the Sale of Food and Drugs Act, 1875 (*g*), in relation to the duties of analysts, proceedings to obtain analysis, and proceedings against offenders; and all officers employed under the last-mentioned Act are empowered and required to carry out the provisions of the said Acts (*h*). Proceedings.

140. A person who unlawfully deals with, sells, or exposes or offers for sale (*i*), or has in his possession for the purpose of sale, Presumption against vendor.

known in such other manner as the Local Government Board may direct (Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 7 (2)).

(*b*) *Ibid.*, s. 7 (3); for penalties see p. 62, *post*. The use of a small quantity of preservative does not prevent butter being "pure butter" in the commercial sense (*Roose* v. *Perry & Co.* (1900), 44 Sol. Jo. 503).

(*c*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 9 (1). As to consignments of milk-blended butter, see p. 58, *ante*; and as to offences under s. 9, and penalties, see p. 62, *post*.

(*d*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 10 and compare p. 57, *ante*. The Board from time to time publish a list of the names approved for use in connection with milk-blended butter.

(*e*) 50 & 51 Vict. c. 29.

(*f*) 7 Edw. 7, c. 21.

(*g*) 38 & 39 Vict. c. 63, ss. 12—28 inclusive; see pp. 12 *et seq.* and p. 29, *ante*. As to the form of the analyst's certificate in butter cases, see *Hunter* v. *Wintrup* (1904), 4 Adam, 471.

(*h*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 12; Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 11 (2).

(*i*) An offer to sell is not necessarily the same thing as an offering for sale; see *World's Tea Co.* v. *Gardner* (1895), 59 J. P. 358.

SECT. 3. Butter, Cheese, and Margarine.

any quantity of margarine or margarine-cheese or milk-blended butter, or who describes any milk-blended butter contrary to the statute (*k*), will be liable to be convicted unless he satisfies the court that he purchased the article in question as butter, and with a written warranty or invoice to that effect (*l*), and that he had no reason to believe at the time when he sold it that the article was other than butter (*m*), and that he sold it in the same state as when he purchased it, in which case he is entitled to be discharged from the prosecution (*n*).

Warranty.

Liability of servants or agents.

141. An employer charged with an offence against the Margarine Act, 1887 (*o*), or the Butter and Margarine Act, 1907 (*p*), is entitled, upon laying a proper information, to have any person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the employer satisfies the court that he had used due diligence to enforce the execution of the Acts, and that the said other person had committed the offence in question without his knowledge, consent, or connivance (*q*), the said other person must be summarily convicted of such offence, and the employer will then be exempt from any penalty (*r*).

Penalties.

142. The punishment for any offence, except where otherwise expressly indicated, is, on summary conviction, a fine not exceeding £20 for a first offence, not exceeding £50 for a second offence, and not exceeding £100 for a third or subsequent offence (*s*). In certain cases a sentence of imprisonment may be passed (*t*).

Appropriation of penalties.

Any part of a penalty recovered may, if the court so directs, be paid to the person who proceeds for the same, to reimburse him for the legal costs of obtaining the analysis and any other reasonable expenses to which the court considers him to be entitled (*a*).

(*k*) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 9.

(*l*) As to the defence of warranty generally, see pp. 25—29, *ante;* the matters there dealt with apply to offences under the Acts now under consideration.

(*m*) In *Fitzgerald* v. *Leonard* (1893), 32 L. R. Ir. 675, it was held in Ireland that guilty knowledge was essential to complete an offence under the Margarine Act, 1887 (50 & 51 Vict. c. 29), and that the effect of s. 7 of that Act is only to throw the onus of proving absence of guilty knowledge upon the defendant; see p. 18, *ante.*

(*n*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 7; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 5; Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 9 (3).

(*o*) 50 & 51 Vict. c. 29.

(*p*) 7 Edw. 7, c. 21.

(*q*) See also p. 28, *ante.*

(*r*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 5; Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 11 (2).

(*s*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 4; Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 17 (1); Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 11 (1); see also p. 33, *ante.*

(*t*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 17 (2); and see p. 33, *ante.*

(*a*) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 11; Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 11 (2).

In the absence of any direction by the court, the penalty is to be paid to the officer of the local authority prosecuting, if any, and not to the police (*b*).

SECT. 4.—*Coffee and Chicory.*

Imitations of coffee or chicory.

143. No article or substance prepared or manufactured for the purpose of being in imitation of, or in any respect to resemble, or to serve as a substitute for, coffee or chicory, nor any mixture of such article or substance with coffee or chicory, may be sold or exposed to sale, or be offered or kept ready for sale, or be delivered out of the custody or possession of any preparer, manufacturer, or importer thereof, except in packets, containing one quarter of a pound or any number of quarters of a pound, bearing a label or labels denoting the amount of duty thereon, and so fixed that the packet cannot be opened without tearing or destroying the label or labels, and so that every label, if more than one is affixed, is wholly or partially visible. In the case of coffee mixtures, the packet must also bear a label denoting, in letters of not less size than the largest letters on such label, the proper name of the several articles or substances of which the mixture is composed. Any contravention of these requirements renders the offender liable to forfeiture of the offending article and to a fine of £20 (*c*).

Compliance with these requirements as to labels does not, however, protect the seller against proceedings under the Sale of Food and Drugs Acts in respect of any adulteration (*d*).

Weighted coffee.

144. It is an offence punishable by a penalty of £100 for any person, either in roasting any coffee, or soon after the roasting or before the selling thereof, to use, or add to, or mix therewith, any butter, lard, grease, water, or other materials whatever, in order to increase the weight of the coffee; and a similar penalty attaches to any trader or dealer in coffee who knowingly buys or sells any coffee so mixed, or to which such addition has been made (*e*).

SECT. 5.—*Milk and Cream.*

Registration of milk sellers.

145. The Local Government Board may make orders (1) for the registration of all persons carrying on the trade of cowkeepers, dairymen, or purveyors of milk; (2) for the inspection of cattle in dairies, and for prescribing and regulating the sanitary condition of dairies and cowsheds occupied by cowkeepers or dairymen; (3) for securing the cleanliness of milk stores and milk shops, and of milk vessels used for containing milk for sale; (4) for the

(*b*) *R.* v. *Titterton*, [1895] 2 Q. B. 61.

(*c*) Customs and Inland Revenue Act, 1882 (45 & 46 Vict. c. 41), ss. 5, 6. As to duty on imitations, substitutes, and mixtures, and the regulation of business of a chicory dryer or roaster, see titles REVENUE; TRADE AND TRADE UNIONS.

(*d*) For an enumeration of these Acts, see p. 3, *ante*. As to cases under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 8, see p. 24, *ante*, and *Star Tea Co.* v. *Neale* (1909), 73 J. P. 511. As to false trade descriptions applied to coffee, see title TRADE MARKS.

(*e*) Adulteration of Tea and Coffee Act, 1724 (11 Geo. 1, c. 30), s. 9. As to the recovery of the penalties, see *ibid.*, s. 39; see also Adulteration of Coffee Act, 1718 (5 Geo. 1, c. 11), s. 23.

SECT. 5. **Milk and Cream.**

protection of milk against infection or contamination (*f*); and (5) for authorising a local authority to make regulations in connection with any of these matters (*g*).

Standard of purity.

146. The Board of Agriculture and Fisheries may make regulations for determining what deficiency in any of the normal constituents of genuine milk or cream, or what addition of extraneous matter or proportion of water in any sample of milk (including condensed milk) or cream shall, for the purposes of the Sale of Food and Drugs Acts, raise a presumption, until the contrary is proved, that the milk or cream is not genuine, or is injurious to health. Such regulations must be notified in the *London Gazette*, and also made known as the Board may direct. An analyst must

(*f*) See titles ANIMALS, Vol. I., pp. 433, 434; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), s. 34; Contagious Diseases (Animals) Act, 1886 (49 & 50 Vict. c. 52), s. 9. Under this authority Orders have been made which are in force throughout England and Wales, namely, the Dairies, Cowsheds and Milkshops Orders of 1885, 1886, and 1889 (Statutory Rules and Orders Revised, Vol. IV., Dairy, pp. 1, 6, 8). Under art. 13 of the Order of 1885 many local authorities have regulations in force in their districts which extend and elaborate the general provisions of the Orders. The Local Government Board has issued model regulations under this article. Both orders and regulations should be referred to in any matter connected with the sanitation and cleanliness of dairies, cowsheds, and milk-shops, as well as with infectious disease therein. A farmer who keeps cows, but only occasionally sells small quantities of milk to neighbours, does not carry on the trade of a dairyman or purveyor of milk (*Southwell* v. *Lewis* (1880), 45 J. P. 206). An ice-cream vendor is not a purveyor of milk so as to require registration (*Pianta* v. *Lang* (1894), 1 Adam, 330). As to trading, see *Emerton* v. *Hall* (1910), 102 L. T. 889. As to dairy regulations in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 28, which empowers the Local Government Board to make orders, as regards the metropolis, for (1) the registration with the county council of all persons carrying on the trade of dairymen; (2) the inspection of cattle in dairies, and the lighting, ventilation, cleansing, drainage, and water supply of dairies in the occupation of persons carrying on the trade of dairymen; (3) securing the cleanliness of milk vessels used for containing milk for sale by such persons; (4) prescribing precautions to be taken for protecting milk against infection or contamination; and (5) authorising the county council to make bye-laws for any of these purposes. Under this power orders were made in 1885 and 1886. Subject to the power of the London County Council to make bye-laws thereunder, and, in case of default, to the provisions of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 100, 101, the duty of registering dairymen has been transferred to the metropolitan borough councils, and it is the duty of each such council to enforce within their borough the bye-laws and regulations for the time being in force with respect to dairies and milk, and they have for this purpose the same powers of entering upon premises as they possess with regard to slaughter-houses and knackers' yards (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (4)); see also title PUBLIC HEALTH AND LOCAL ADMINISTRATION. A farmer who keeps cows and uses the milk to fatten calves for sale is not a dairyman under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 20 (*Umfreville* v. *London County Council* (1896), 61 J. P. 84), which Act (see s. 141, *ibid.*) defines the expression "dairyman" as including any cow-keeper, purveyor of milk, or occupier of a dairy. The expression "dairy" (*ibid.*) includes any farm, farmhouse, cowshed, milk-store, milk-shop, or other place from which milk is supplied, or in which milk is kept for purposes of sale. Several large towns have local Acts authorising the council to take precautions to prevent the sale of tuberculous milk. See, for example, London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.); but the provisions in that Act contain variations from those appearing in other local Acts.

have regard to such regulations in certifying the result of an analysis of milk or cream under those Acts (*h*). By virtue of this power a standard of purity for milk has been prescribed by the Board. No standard for cream has yet been fixed. The fact that a sample of milk falls short of the standard is not conclusive evidence of adulteration, nor is the fact that the sample is above the standard conclusive evidence that the milk is genuine (*i*).

Abstraction of cream.

147. The removal of cream from milk with intent to sell the milk in its altered state without notice is a punishable offence, as is also the sale of the impoverished milk without notice of the abstraction, and such notice must be a notice to the purchaser at the time of sale (*j*). It is no defence to proceedings in respect of the sale of such milk for a seller to plead that he had no knowledge of the abstraction, unless he can produce a written warranty of genuineness (*k*). Nor is it necessary for the prosecution to show that the removal of the cream was deliberate or with a wrongful intent (*l*).

Importation of milk or cream.

148. If there is imported into the United Kingdom any adulterated or impoverished milk or cream, except in packages or cans conspicuously marked with a name and description indicating that the milk or cream has been so treated, or any condensed separated or skimmed milk, except in tins or other receptacles

(*h*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 4. The Sale of Milk Regulations, 1901 (Statutory Rules and Orders Revised, Vol. I., Adulteration, p. 6), have been made under this power.

(*i*) Milk containing less than 3 per cent. of milk-fat, or less than 8·5 per cent. of milk-solids other than milk-fat, and skimmed and separated milk (not being condensed milk), containing less than 9 per cent. of milk-solids, are to be presumed, for the purposes of the Sale of Food and Drugs Acts, not to be genuine, until the contrary is proved (Sale of Milk Regulations, 1901). In *Smithies* v. *Bridge*, [1902] 2 K. B. 13, a prosecution under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, it was held that where there was a large deficiency of milk-fat in the milk, owing to the length of time that had elapsed since the previous milking, the seller was rightly convicted, although there had been no abstraction of fat and no adulteration. But this case was distinguished in *Wolfenden* v. *McCulloch* (1905), 69 J. P. 228, where there was a small deficiency arising from the same cause, and an express finding that there had been no adulteration. The justices held that they were bound to convict by the decision in *Smithies* v. *Bridge*, *supra*, but the King's Bench Division decided that they were not so bound, and ought to have considered the matter for themselves (see also p. 20, *ante*).

(*j*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9; and see p. 19, *ante*. As to what is or is not a sufficient notice of alteration to a purchaser, see *Jones* v. *Davies* (1893), 57 J. P. 808; *Spiers and Pond* v. *Bennett*, [1896] 2 Q. B. 65; *Platt* v. *Tyler*, *Wright* v. *Tyler* (1894), 58 J. P. 71; *Petchey* v. *Taylor* (1898), 62 J. P. 360; see, also, *Brown* v. *Foot* (1892), 61 L. J. (M. C.) 110; and compare *Kearley* v. *Tonge* (1891), 60 L. J. (M. C.) 159.

(*k*) *Pain* v. *Boughtwood* (1890), 24 Q. B. D. 353; *Morris* v. *Corbett* (1892), 56 J. P. 649. As to warranties, see pp. 25—29, *ante*.

(*l*) *Dyke* v. *Gower*, [1892] 1 Q. B. 220. An accidental or careless removal of cream, as by neglect to keep milk stirred, so that the cream rises to the surface and is taken off in the earlier sales, leaving the remainder of the milk without a proper proportion of cream, is sufficient to support a conviction for a sale of the impoverished milk. A special contract between vendor and purchaser as to the quality of milk to be supplied, which provides for a reduction in price if the milk is deficient in cream, will not prevent a conviction (*Fecitt* v. *Walsh*, [1891] 2 Q. B. 304).

SECT. 5. Milk and Cream.

which bear a label whereon the words "machine-skimmed milk" or "skimmed milk," as the case may require, are printed in large and legible type, the importer will be liable on summary conviction for the first offence to a fine not exceeding £20, for the second offence to a fine not exceeding £50, and for any subsequent offence to a fine not exceeding £100 (*m*).

Condensed milk.

149. Every tin or other receptacle containing condensed separated or skimmed milk must bear a label clearly visible to the purchaser, on which the words "machine-skimmed milk" or "skimmed milk," as the case may require, are printed in large and legible type: any person who sells, or exposes or offers for sale, such an article not so labelled is liable on summary conviction to a penalty not exceeding £10 (*n*).

Samples.

150. Any of the authorised officers (*o*) may procure at the place of delivery (*p*) any sample of milk in course of delivery (*q*) to the purchaser or consignee in pursuance of a contract for the sale to such purchaser or consignee of such milk; and, if such officer suspects the milk to have been sold contrary to any of the provisions of the Sale of Food and Drugs Act, 1875 (*r*), he must submit it to be analysed (*s*). In procuring such a sample it is not necessary to comply with any of the formalities required in the case of other samples (*t*), but the person taking the sample must send, by registered parcel or otherwise, a portion of the sample, marked and sealed or fastened up, to the consignor, if his name and address appear on the can or packages containing the article sampled (*u*). It is not necessary to obtain the consent of the purchaser or consignee before taking such a sample (*a*).

(*m*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1 (1) (b), (c). As to importation generally, see p. 43, *ante*.

(*n*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 11. It is doubtful whether or not the defence of warranty (see p. 25, *ante*) applies to an offence created by this section. To offer to sell is not the same thing as offering for sale; see *World's Tea Co.* v. *Gardner* (1895), 59 J. P. 358, where it was held that advertising an article was an offer to sell, though it was not offering for sale. The latter expression involves a physical offer of the article. "S. 11 of the Act of 1899 does not apply to milk carried round for sale in an ordinary can, but only to condensed milk" (*French* v. *Card* (1909), 73 J. P. 389, *per* Lord ALVERSTONE, C.J., at p. 390). This is reading the section as if the words were "condensed separated milk or condensed skimmed milk."

(*o*) For these officers, see p. 12, *ante*. As to the employment of a deputy, see p. 14, *ante*.

(*p*) As to the meaning of "place of delivery," see p. 13, *ante*.

(*q*) Milk may be still "in course of delivery" though it has been poured into a receptacle at the purchaser's shop (*Semple* v. *Dunbar* (1904), 4 Adam, 399); see, also, *Telford* v. *Fyfe*, [1908] S. C. (J.) 83, and p. 13, *ante*.

(*r*) 38 & 39 Vict. c. 63.

(*s*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3. A private person cannot take a sample of milk in course of delivery or proceed under this section (*Harris* v. *Williams* (1889), 6 T. L. R. 47). The law as to analysis and any subsequent proceedings will be the same as if the sample had been purchased under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 13; see p. 12, *ante*.

(*t*) *Rouch* v. *Hall* (1880), 6 Q. B. D. 17; see other cases cited at p. 15, *ante*.

(*u*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 10.

(*a*) *Ibid.* The Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51),

Analyst's certificate.

151. Where a sample of milk or cream has been sent to the analyst he must specially report in his certificate whether any change had taken place in the constitution of the article that would interfere with the analysis (*b*). Such a report is a condition precedent to a prosecution, and the lack thereof cannot be remedied by evidence (*c*). The analyst must also have regard to the regulations made by the Board of Agriculture and Fisheries under the Sale of Food and Drugs Act, 1899 (*d*).

Sale from vehicle.

152. Every person who, himself or by his servant, in any highway or place of public resort sells milk or cream from a vehicle or from a can or other receptacle must, under a penalty not exceeding £2, have his name and address conspicuously inscribed on the vehicle or receptacle (*e*). If the sale is from a cart, the name and address must be on the cart; but if the cart is only used as a transporting vehicle, and the sale is in fact from a can or receptacle, then the name and address must be on the can, and it is not sufficient to have them on the cart only (*f*).

SECT. 6.—*Spirits.*

Dilution.

153. In determining whether an offence has been committed (*g*) by selling to the prejudice of the purchaser (*h*) spirits not adulterated otherwise than by the admixture of water, it is a good defence to prove that such admixture has not reduced the spirit more than 25 degrees under proof for brandy, whisky, or rum, or 35 degrees under proof for gin (*i*). The object of this provision is to set up a standard of strength for spirits, but it does not prevent a defendant putting forward any other defence he may have to the charge against him (*k*).

s. 14 (see p. 15, *ante*), only applies to the "every other article of food" therein mentioned, and not to milk. The quantity of milk purchased as a sample should not be less than one pint, and the bottle used for the reserved portion should be of such capacity that the milk may nearly fill it, as too large a bottle is apt to result in churning (see letter of Local Government Board, 26th February, 1894, and letter of the Board of Agriculture and Fisheries, 28th December, 1901, relating to the treatment of samples of milk).

(*b*) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), Schedule; see note (*a*), p. 10, *ante*.

(*c*) *Peart* v. *Barstow* (1880), 44 J. P. 699; *Hudson* v. *Bridge* (1903), 67 J. P. 186; *Hunter* v. *Wintrup* (1904), 4 Adam, 471.

(*d*) 62 & 63 Vict. c. 51, s. 4; these regulations are the Sale of Milk Regulations, 1901; see p. 64, *ante*.

(*e*) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 9. As to a master's responsibility for the acts of his servant, see p. 18, *ante*.

(*f*) *Crabtree* v. *Skelton* (1901), 70 L. J. (K. B.) 560.

(*g*) Under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.

(*h*) See p. 18, *ante*.

(*i*) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 6; compare *Wilson and M'Phee* v. *Wilson* (1903), 41 Sc. L. R. 195.

(*k*) See *Gage* v. *Elsey* (1883), 10 Q. B. D. 518; *Palmer* v. *Tyler* (1897), 61 J. P. 389; *Morris* v. *Johnson* (1890), 54 J. P. 612; and *Findley* v. *Haas* (1903), 67 J. P. 198. (*Pashler* v. *Stevenitt* (1876), 41 J. P. 136, and *Webb* v. *Knight* (1877), 2 Q. B. D. 530, are no longer effective on this point.) For the law relating to the manufacture, importation, and sale of spirits, wines, and other intoxicating or dutiable liquors, see titles INTOXICATING LIQUORS; REVENUE.

SECT. 7. SECT. 7.—*Tea.*

Tea.

Examination.

154. All tea imported as merchandise and landed at any port may be inspected, examined, and analysed by persons appointed by the Commissioners of Customs for that purpose. Such an inspector may take a sample when he deems this course necessary, and must cause it to be examined by an appointed analyst. If upon such analysis the tea is found to be mixed with other substances or exhausted tea (*l*), the same is not to be delivered without the sanction of the Commissioners of Customs, who may impose terms and conditions, either for home consumption or for use as ships' stores or for exportation. If on such inspection and analysis it appears that the tea is in the opinion of the analyst unfit for human food, it must be forfeited and destroyed or otherwise disposed of as the Commissioners may direct (*m*).

Adulteration.

155. Any dealer in tea, or manufacturer or dyer thereof, or person pretending so to be, who counterfeits or adulterates tea, or causes or procures it to be counterfeited or adulterated, or alters, fabricates, or manufactures tea with "terra japonica" (*n*), or with any drug or drugs whatsoever, or who mixes or causes or procures to be mixed with tea any leaves, other than leaves of tea, or other ingredients whatsoever, is liable to have such tea forfeited and to be fined £100 (*o*).

Sophisticated tea.

156. Any dealer in or seller of tea who dyes, fabricates, or manufactures any sloe leaves, liquorish leaves, or the leaves of tea that have been used, or the leaves of any other tree, shrub, or plant in imitation of tea, or mixes, colours, stains or dyes such leaves or tea with terra japonica, sugar, molasses, clay, logwood, or with any other ingredients or materials whatsoever, or sells and vends, or utters, offers, or exposes to sale, or has in his custody or possession any such dyed, fabricated, or manufactured leaves in imitation of tea, or any such coloured, stained, or dyed leaves or tea mixed with any of the ingredients before mentioned, or with any other ingredients whatsoever, is liable for every pound of such leaves so dyed, fabricated, or manufactured in imitation of tea, and for every pound of such mixed, coloured, stained, or dyed leaves or tea, to a penalty of £10 (*p*).

A penalty of £5, with imprisonment in default of payment, in respect of each pound of leaves, may be imposed upon any person, whether a dealer in or seller of tea or not, who dyes, fabricates, manufactures, mixes, colours, stains, or dyes leaves in manner above mentioned, or sells, utters, offers, or exposes for sale, or has in his custody or possession, any such leaves as above described (*q*).

(*l*) "Exhausted tea" means and includes any tea which has been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means (Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 31).

(*m*) *Ibid.*, s. 30.

(*n*) Now known as catechu.

(*o*) Adulteration of Tea and Coffee Act, 1724 (11 Geo. 1, c. 30), s. 5.

(*p*) Adulteration of Tea Act, 1730 (4 Geo. 2, c. 14), s. 11.

(*q*) Adulteration of Tea Act, 1776 (17 Geo. 3, c. 29), s. 1.

A similar penalty may be imposed on the summary conviction, on the oath of a credible witness, of any person who has in his custody or possession any quantity over six pounds in weight of sloe leaves or the leaves of ash, elder, or any other tree, shrub, or plant, green or manufactured, and who cannot satisfy the justices that such leaves were gathered with the consent of the owners of the trees, shrubs or plants from which they were taken, and that they were not gathered for the purpose of making imitation tea (*r*). A search warrant may be granted to a revenue officer upon sworn information, and any such leaves and the waggons, carts, boxes, bags, or other receptacles may be seized, and the leaves destroyed and the receptacles sold, unless the owner within twenty-four hours satisfies the justices that his possession thereof was a lawful one (*s*). Any conviction will be final and conclusive (*t*).

Extracts of tea.

157. Extracts of tea may not be imported, except when in course of transit or for exportation (*a*).

SECT. 8.—*Miscellaneous.*

SUB-SECT. 1.—*Hops* (*b*).

Adulterating hops.

158. It is an offence to mix or put any drug or ingredient or other thing whatsoever into any quantity of hops in order to alter the colour or scent thereof. The penalty is £5 for every hundredweight of hops so treated (*c*). An offence is committed if the vapour of sulphur or brimstone is mixed with hops in order to improve their appearance (*d*).

SUB-SECT. 2.—*Horseflesh.*

"Horseflesh."

159. The expression "horseflesh" includes the flesh of asses and mules, and means horseflesh, cooked or uncooked, alone or accompanied by or mixed with any other substance (*e*).

Restrictions on sale.

160. Horseflesh must not be supplied for human food to a purchaser who has asked to be supplied with some meat other than horseflesh, or with some compound article of food which is not ordinarily made of horseflesh (*f*), and must not be sold, offered,

(*r*) Adulteration of Tea Act, 1776 (17 Geo. 3, c. 29), s. 2.
(*s*) *Ibid.*, ss. 3, 4, 5.
(*t*) *Ibid.*, s. 9.
(*a*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42. For other provisions connected with the sale of tea, see title WEIGHTS AND MEASURES. For false trade descriptions as applied to tea, see title TRADE MARKS. In this connection the cases of *Roberts* v. *Egerton* (1874), L. R. 9 Q. B. 494, and *R.* v. *Foster* (1877), 2 Q. B. D. 301, C. C. R., may be referred to. For offences against the revenue, see title REVENUE; and see *Scott & Co.* v. *Solomon*, [1905] 1 K. B. 577.
(*b*) Hops are not, *per se*, an article of food, and, therefore, do not come within the scope of the Sale of Food and Drugs Acts (for an enumeration of these Acts, see note (*b*), p. 3, *ante*), except when sold for medicinal purposes (compare *James* v. *Jones*, [1894] 1 Q. B. 304).
(*c*) Adulteration of Hops Act, 1733 (7 Geo. 2, c. 19), s. 2.
(*d*) *R.* v. *Pack* (1795), 6 Term Rep. 374. For the sale of hops in marked bags of specified weights, see title AGRICULTURE, Vol. I., p. 291.
(*e*) Sale of Horseflesh etc. Regulation Act, 1889 (52 & 53 Vict. c. 11), s. 7.
(*f*) *Ibid.*, s. 2.

SECT. 8. Miscellaneous.

exposed, nor kept for sale for human food, except in a shop, stall, or place over or upon which is at all times painted, posted, or placed in legible characters of not less than four inches in length and in a conspicuous position, and so as to be visible throughout the whole time, whether by night or day, during which any horseflesh is being offered or exposed for sale, words indicating that horseflesh is sold there (*g*). The burden of proof that horseflesh exposed for sale to the public otherwise than in such a shop, stall, or place was not intended for human food is upon the person exposing it for sale (*h*).

Signs on shop.

Burden of proof.

Inspection.

161. Any medical officer of health or inspector of nuisances or other officer of a local authority (*i*), instructed or appointed by the authority for the purpose, may at all reasonable times inspect and examine meat which he has reason to believe is horseflesh, exposed for sale or deposited for the purpose of sale, or of preparation for sale, and intended for human food, in any place other than a duly indicated shop, stall, or place; and he may seize and carry away such meat, or cause it to be seized and carried away, in order that it may be dealt with by a justice (*k*). He may also on complaint on oath obtain a search warrant in aid of such powers of inspection and examination (*l*). If it appears to any justice that any meat so seized is horseflesh intended for human food, he may make such order with regard to the disposal thereof as he may think desirable; and the person in whose possession or on whose premises the meat was found will be deemed to have committed an offence, unless he proves that the meat was not intended for human food contrary to these provisions (*m*).

Seizure.

Penalty.

162. An offence against any of these provisions may be punished on summary conviction by a penalty not exceeding £20 (*n*).

SUB-SECT. 3.—*Ice Cream.*

Manufacture and sale of ice cream in London.

163. In the administrative county of London and in some other large towns powers have been obtained by local Acts for controlling the preparation and sale from barrows by itinerant vendors of ice cream (*o*). In London it is an offence for a manufacturer of, or merchant or dealer in, ice creams or any similar commodity, to make, sell, or store the commodity in any cellar, shed, or room in which there is an inlet or opening to a drain, or which is used as a

(*g*) Sale of Horseflesh etc. Regulation Act, 1889 (52 & 53 Vict. c. 11), s. 1.
(*h*) *Ibid.*, s. 6.
(*i*) The local authority is, in the City of London and the liberties thereof, the Common Council; in the metropolitan boroughs the borough councils; and elsewhere the urban and rural sanitary authorities (*ibid.*, s. 8, as affected by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (1)).
(*k*) Sale of Horseflesh etc. Regulation Act, 1889 (52 & 53 Vict. c. 11), s. 3.
(*l*) *Ibid.*, s. 4. Obstruction of an officer is an offence under the Act (*ibid.*).
(*m*) *Ibid.*, s. 5.
(*n*) *Ibid.*, s. 6.
(*o*) An ice-cream vendor is not a purveyor of milk so as to require registration under the Dairies, Cowsheds and Milkshops Orders; see *Pianta* v. *Lang* (1894), 1 Adam. 330.

SECT. 8. Miscellaneous.

living or sleeping room, or to do anything likely to expose the commodity to infection or contamination, or to omit to take any proper precaution for its protection therefrom. Notice must be given to the medical officer of any infectious disease in any premises where the commodity is made, sold, or stored, or among any persons employed, or living, or working therein.

Itinerant vendors.

Every itinerant vendor of any such commodity must, if not himself the manufacturer thereof, exhibit in a legible manner, on a conspicuous part of his barrow, a notice stating the name and address of the person from whom he obtains such commodity, or, if himself the manufacturer, his own name and address. The penalty for an offence under the aforesaid provisions is a sum not exceeding 40*s.* on summary conviction (*p*).

(*p*) See London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), ss. 42, 43. The powers obtained by other towns are generally similar to those in force in London.

FOOTPATHS.

See HIGHWAYS, STREETS, AND BRIDGES.

FORBEARANCE.

See CONTRACT.

FORCIBLE ENTRY.

See LANDLORD AND TENANT; TRESPASS.

FORECLOSURE.

See EQUITY; MORTGAGE; PRACTICE AND PROCEDURE.

FOREIGN ATTACHMENT.

See MAYOR'S COURT.

FOREIGN BILLS.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

FOREIGN COMPANIES.

See COMPANIES.

FOREIGN COPYRIGHT.

See COPYRIGHT AND LITERARY PROPERTY.

FOREIGN CORPORATIONS.

See CORPORATIONS.

FOREIGN DOMICIL.

See CONFLICT OF LAWS.

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See CRIMINAL LAW AND PROCEDURE.

FOREIGN JUDGMENTS.

See CONFLICT OF LAWS; CONSTITUTIONAL LAW; EVIDENCE.

FOREIGN JURISDICTION.

See CONSTITUTIONAL LAW.

FOREIGN LAW.

See CONFLICT OF LAWS.

FOREIGN OFFICE.

See CONSTITUTIONAL LAW.

FOREIGN SOVEREIGNS.

See ACTION; CONFLICT OF LAWS.

FOREIGN TRADE MARK.

See TRADE MARKS.

FOREIGN WILLS.

See CONFLICT OF LAWS; WILLS.

FORESHORE.

See CONSTITUTIONAL LAW; FISHERIES; WATERS AND WATERCOURSES.

FORESTALLING.

See CRIMINAL LAW AND PROCEDURE; TRADE AND TRADE UNIONS.

FOREST COURTS.

See CONSTITUTIONAL LAW; COURTS.

FORESTS.

See CONSTITUTIONAL LAW.

FORFEITURE.

See ADMIRALTY; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; COPYHOLDS; CRIMINAL LAW AND PROCEDURE; EQUITY; FISHERIES; FOOD AND DRUGS; GAME; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; WEIGHTS AND MEASURES.

FORGERY.

See BANKERS AND BANKING; CRIMINAL LAW AND PROCEDURE.

FORMÂ PAUPERIS.

See COURTS; HUSBAND AND WIFE; PRACTICE AND PROCEDURE.

FORTUNE-TELLING.

See CRIMINAL LAW AND PROCEDURE.

FOX-HUNTING.

See TRESPASS.

FRANCHISE.

See CONSTITUTIONAL LAW; COPYHOLDS; ELECTIONS; FERRIES; FISHERIES; MARKETS AND FAIRS; REAL PROPERTY AND CHATTELS REAL.

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FRAUDULENT AND VOIDABLE CONVEYANCES.

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Part I.—Conveyances Impeachable by Creditors.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Effect of the Statute* 13 *Eliz. c.* 5.

Effect of the statute 13 Eliz. c. 5.

164. By the statute 13 Eliz. c. 5, entitled An Act against Fraudulent Deeds, Gifts, Alienations etc., it is provided that any alienation of real or personal property, made with the intention of delaying, hindering, or defrauding (*a*) creditors, shall be void as against such creditors (*b*). A *bonâ fide* purchaser for value, however, who takes an estate or interest from the grantor without notice of the fraud, is protected as against the claims of the creditors, although the intention of the grantor was fraudulent (*c*). The avoidance under the statute is only for the benefit of creditors, and when they have been satisfied the alienation stands good for all other purposes (*d*), and cannot be impeached by other persons (*e*).

(*a*) See *Cadogan* v. *Kennett* (1776), 2 Cowp. 432, *per* Lord MANSFIELD, at p. 434: "The principles and rules of the common law as now universally known and understood are so strongly against fraud in every shape that the common law would have attained every end proposed by the statutes (1571) 13 Eliz. c. 5, and (1584-5) 27 Eliz. c. 4." See also *Freeman* v. *Pope* (1870), 5 Ch. App. 538, 540; *Re Lane-Fox, Ex parte Gimblett*, [1900] 2 Q. B. 508.

(*b*) Stat. (1571) 13 Eliz. c. 5, s. 1 (s. 2 in the statutes at large). The stat. (1571) 13 Eliz. c. 5 was made perpetual by stat. (1587) 29 Eliz. c. 5. Compare Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 275.

(*c*) Stat. (1571) 13 Eliz. c. 5, s. 5.

(*d*) *Curtis* v. *Price* (1805), 12 Ves. 89, 103; *Cornish* v. *Clark* (1872), L. R. 14 Eq. 184, 189; *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157. As to the form of order giving effect to this principle, see p. 90, *post*.

(*e*) See p. 87, *post*.

SUB-SECT. 2.—*Property within the Statute.*

Property within the statute.

165. Since creditors cannot be delayed, hindered, or defrauded by an alienation of property which was never within their reach, the statute only applies to such property as can be taken in execution (*f*). The enactments (*g*) which have made new kinds of property liable to be taken in execution have, however, extended the scope of the statute (*h*): thus, alienations of copyholds (*i*), of equitable reversionary interests (*k*), of policies of insurance, and other choses in action (*l*), and of the goodwill of a business (*m*), can now be set aside. If, however, at the date of the alienation, the property alienated was not of a kind liable to be taken in execution, a subsequent enactment making such description of property so liable will not benefit the creditors defeated by that alienation (*n*).

Moneys of husband invested in name of wife.

Money belonging to a husband, but deposited or invested in the name of his wife in fraud of his creditors, is available to satisfy his debts, notwithstanding the provisions of the Married Women's Property Act, 1882 (*o*).

SUB-SECT. 3.—*Dispositions within the Statute.*

Alienations in fraud of creditors.

166. The statute extends to all forms of alienation by which creditors may be delayed, hindered, or defrauded (*p*). Thus, the exercise of a general power of appointment may be within the statute (*q*), but not the exercise of a special power of appointment, unless the donee of the power was himself entitled in default of appointment (*r*), as such an alienation would take no property out of the reach of a creditor. The statute extends to separation deeds, especially if voluntary (*s*); to marriage settlements if the marriage was part of the fraud, and both husband and wife were parties to

(*f*) *Mathews* v. *Feaver* (1786), 1 Cox, Eq. Cas. 278. The property mentioned in the statute is "lands, tenements, hereditaments, goods and chattels," or "any lease, rent, common or other profit or a charge out of the same" (stat. (1571) 13 Eliz. c. 5, s. 1). As to what property can be taken in execution, see title EXECUTION, Vol. XIV., p. 1.

(*g*) See title EXECUTION, Vol. XIV., pp. 48, 66.

(*h*) *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157, 166.

(*i*) *Bott* v. *Smith* (1856), 21 Beav. 511.

(*k*) *Ideal Bedding Co., Ltd.* v. *Holland, supra.*

(*l*) *Stokoe* v. *Cowan* (1861), 29 Beav. 637; *Taylor* v. *Coenen* (1876), 1 Ch. D. 636; *Re Mouat, Kingston Cotton Mills Co.* v. *Mouat*, [1899] 1 Ch. 831; *Edmunds* v. *Edmunds*, [1904] P. 362.

(*m*) *French* v. *French* (1855), 6 De G. M. & G. 95; *Neale* v. *Day* (1858), 28 L. J. (CH.) 45.

(*n*) *Sims* v. *Thomas* (1840), 12 Ad. & El. 536, 555.

(*o*) 45 & 46 Vict. c. 75, s. 10. As to what is separate property under this Act, see title HUSBAND AND WIFE.

(*p*) *Cadogan* v. *Kennett* (1776), 2 Cowp. 432, 434; see *Partridge* v. *Gopp* (1758), Amb. 596 (gifts to children).

(*q*) *Townshend (Lord)* v. *Windham* (1750), 2 Ves. Sen. 1, 10; *Whittington* v. *Jennings* (1834), 6 Sim. 493; and see *Martyn* v. *M'Namara* (1843), 4 Dr. & War. 411.

(*r*) Chance, Treatise on Powers (1831), s. 1850.

(*s*) *Stephens* v. *Olive* (1786), 2 Bro. C. C. 90; *Hobbs* v. *Hull* (1788), 1 Cox, Eq. Cas. 445; *Nunn* v. *Wilsmore* (1800), 8 Term Rep. 521; see also *Jones* v. *Waite* (1839), 5 Bing. (N. C.) 341, Ex. Ch.

SECT. 1. In General.

the fraudulent intent (*t*); to a purchase in the name of a child or other third party (*u*), or in the joint names of the debtor and a third party (*w*); to a sale in consideration of a payment to a third party (*x*); and to a judgment suffered (*a*). A deed, executed by a debtor who is tenant-in-tail, operating to disentail property and to resettle it on the debtor for life, is not within the statute, as nothing is thereby taken out of the reach of creditors (*b*), and this is apparently the case even where the property is disentailed and resettled by two separate deeds, provided that the two deeds in fact form parts of the same transaction (*c*).

Creditors' trust deeds.

167. A deed, though in form a trust deed for the benefit of creditors, and therefore *primâ facie* not fraudulent (*d*), if it is a cloak for retaining a benefit for the debtor at the expense of the creditors, or if it seeks to impose obligations on the creditors not required of them at law, will be set aside under the statute at the instance of creditors not parties thereto (*e*). In determining the validity of such a trust deed, the deed must be considered as a whole, and where it is substantially for the benefit of the creditors a proviso beneficial to the debtor, if consistent with the tenor and object of the trust, will not render the deed void (*f*).

Assignment between partners.

An assignment by an outgoing partner of his share in the partnership property to the sole continuing partner, in consideration of a covenant for the payment of the partnership debts, may be set aside as calculated to delay, hinder, or defraud both the creditors of the firm and the separate creditors of the outgoing partner (*g*).

Settlements by married women.

Settlements by married women of their property made after the 1st January, 1883, are within the statute (*h*).

(*t*) *Colombine* v. *Penhall*, *Penhall* v. *Miller* (1853), 1 Sm. & G. 228; *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46; see *Re Reis*, *Ex parte Clough*, [1904] 2 K. B. 769, C. A.; affirmed *sub nom. Clough* v. *Samuel*, [1905] A. C. 442; *Re Pennington*, *Ex parte Pennington* (1888), 5 T. L. R. 29, C. A.

(*u*) *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110.

(*w*) *Stileman* v. *Ashdown* (1742), 2 Atk. 477; see *Glaister* v. *Hewer* (1802), 8 Ves. 195.

(*x*) *Neale* v. *Day* (1858), 28 L. J. (CH.) 45; *French* v. *French* (1855), 6 De G. M. & G. 95.

(*a*) *Imray* v. *Magnay* (1843), 11 M. & W. 267; *Meux* v. *Howell* (1803), 4 East, 1; and see *Clavey* v. *Hayley* (1776), 2 Cowp. 427.

(*b*) *Clements* v. *Eccles* (1847), 11 I. Eq. R. 229.

(*c*) *Ibid.*, at p. 239.

(*d*) *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, P. C.; see *Pickstock* v. *Lyster* (1815), 3 M. & S. 371; compare *Re Gillo*, *Ex parte Dollar* (1891), 8 Morr. 157 (which was a sale of all a debtor's assets in consideration of the payment of ten shillings in the pound on all debts).

(*e*) *Spencer* v. *Slater* (1878), 4 Q. B. D. 13; *Smith* v. *Hurst* (1852), 10 Hare, 30; *Evans* v. *Jones* (1864), 3 H. & C. 423; *Alton* v. *Harrison*, *Poyser* v. *Harrison* (1869), 4 Ch. App. 622; *Boldero* v. *London and Westminster Discount Co.* (1879), 5 Ex. D. 47; *Green* v. *Brand* (1884), Cab. & El. 410; *Maskelyne and Cooke* v. *Smith*, [1903] 1 K. B. 671, C. A.; see *Re Sinclair*, *Ex parte Chaplin* (1884), 26 Ch. D. 319, C. A.; *Goss* v. *Neale* (1820), 5 Moore (C. P.), 19.

(*f*) *Alton* v. *Harrison*, *Poyser* v. *Harrison*, *supra* (proviso that the debtor should retain possession for six months); *Maskelyne and Cooke* v. *Smith*, *supra*, at p. 676 (similar proviso).

(*g*) *Re Edwards-Wood*, *Ex parte Mayou* (1865), 4 De G. J. &. Sm. 664.

(*h*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19, see

A voluntary expenditure of money in the improvement of another's estate does not entitle the creditors of the person expending the money to a charge on the estate for the amount expended, on the plea that the expenditure is an alienation within the statute, for the money has merged in the estate (*i*).

Money spent on improvements.

SECT. 2.—*Protection of Bonâ Fide Purchasers for Value.*

168. For creditors to be in a position to impeach an alienation of property by their debtor they must prove, in addition to fraudulent intent on the part of the grantor, either that the alienation was made without good, *i.e.*, valuable, consideration (*k*), or that the grantee was privy to the fraud (*l*). Otherwise the grantee will be entitled to the protection given by the statute (*m*), even where a creditor is in fact defeated by the grant (*n*).

13 Eliz. c. 5, s. 5.

Where an alienation is made by a debtor, with intent to defraud his creditors, to a company practically identical with himself, the company must be taken to have had full notice of the true nature of the transaction, and so to be unable to avail itself of the protection, although the alienation is one for valuable consideration (*o*).

Grant to one-man company.

169. The consideration given need not be the full value of the property (*p*), especially when the purchaser is a relative (*q*). It must, however, be more than nominal; and it will not be sufficient that the grantor has escaped some liability attaching to such property, as in the case of an assignment of leaseholds, or of shares in a company that are subject to unpaid calls (*r*).

What is sufficient consideration.

s. 13; *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7; see also *Biscoe* v. *Kennedy* (1762), 1 Bro. C. C. 17, n. (Belt's ed.) (28 English Reports, 961); and as to settlements of married women's property generally, see titles HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

(*i*) *Campion* v. *Cotton* (1810), 17 Ves. 263 a; Sugden, Vendors and Purchasers, 14th ed., p. 707.

(*k*) The statute uses the words "good consideration," but these words have always been held to be equivalent to "valuable consideration"; see *Twyne's Case* (1602), 3 Co. Rep. 80 b; 1 Smith, L. C., 11th ed., p. 1; *Myers* v. *Leinster* (*Duke*) (1844), 7 I. Eq. R. 146.

(*l*) *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Graham* v. *Furber* (1854), 14 C. B. 410; *Hale* v. *Saloon Omnibus Co.* (1859), 4 Drew. 492; *Kevan* v. *Crawford* (1877), 6 Ch. D. 29, C. A.; *Re Johnson, Golden* v. *Gillam* (1881), 20 Ch. D. 389, 394, C. A.; *Re Tetley, Ex parte Jeffrey* v. *Tetley* (1896), 3 Mans. 226, 231; *Re Eyre, Ex parte Eyre* (1881), 44 L. T. 922; *Re Cranston, Ex parte Cranston* (1892), 9 Morr. 160; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, C. A.; affirmed, *sub nom. Clough* v. *Samuel*, [1905] A. C. 442. As to onus of proof, see p. 84, *post*.

(*m*) Stat. (1571) 13 Eliz. c. 5, s. 5 (s. 6 in statutes at large).

(*n*) *Holmes* v. *Penney*, *supra*; *Re Johnson, Golden* v. *Gillam*, *supra*, at p. 396.

(*o*) *Re Hirth (Carl), Ex parte Trustee*, [1899] 1 Q. B. 612, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 625.

(*p*) *Stephens* v. *Olive* (1786), 2 Bro. C. C. 90; *Nunn* v. *Wilsmore* (1800), 8 Term Rep. 521; *Copis* v. *Middleton* (1818), 2 Madd. 410; *Thompson* v. *Webster* (1859), 4 De G. & J. 600, C. A.

(*q*) *Re Johnson, Golden* v. *Gillam*, *supra*; *Arundel* (*Lady*) v. *Phipps and Taunton* (1804), 10 Ves. 139; compare *Strong* v. *Strong* (1854), 18 Beav. 408.

(*r*) *Re Ridler, Ridler* v. *Ridler* (1882), 22 Ch. D. 74, C. A. The principle of *Price* v. *Jenkins* (1877), 5 Ch. D. 619, C. A., only applies to cases under stat. (1584-5) 27 Eliz. c. 4 (see p. 96, *post*), and is not extended to cases under stat. (1571) 13 Eliz. c. 5.

SECT. 2. Protection of Bona Fide Purchasers for Value.

A grant to secure the repayment of an existing debt is one for sufficient consideration (*s*); so, also, is a grant in consideration of the waiving of an equity to a settlement (*t*). Where, on the face of the instrument, there appears either no valuable consideration, or merely a nominal consideration, evidence is admissible to show that in fact there was valuable consideration (*u*).

The consideration of marriage.

170. Marriage is a sufficient consideration (*a*), even when the wife is aware that the husband is indebted at the time (*b*), unless the wife knows of acts of bankruptcy committed before the date of the settlement (*c*). If the marriage is *bonâ fide* it is immaterial that the settlement contains false recitals (*d*), or a covenant to settle all after-acquired property of the husband (*e*). If, however, the marriage is not *bonâ fide*, but a contrivance to remove property from the reach of creditors, it will not avail as a good consideration (*f*); and the marriage consideration will not support, as against creditors, provisions in favour of collaterals (*g*).

Post-nuptial settlements executed in pursuance of ante-nuptial agreements of which specific performance could be obtained are for valuable consideration, and are not, therefore, affected by the statute in the absence of a fraudulent intent common to both parties to the marriage consideration (*h*).

Separation deeds.

Separation deeds by which property is settled in consideration of

(*s*) *Re Bamford, Ex parte Games* (1879), 12 Ch. D. 314, 323, C. A.; *Alton* v. *Harrison, Poyser* v. *Harrison* (1869), 4 Ch. App. 622; *Martindale* v. *Booth* (1832), 3 B. & Ad. 498; see *Allen* v. *Bonnett* (1870), 5 Ch. App. 577. As to sufficient consideration for other purposes, compare p. 96, *post;* and see title CONTRACT, Vol. VII., pp. 383—386.

(*t*) *Re Home, Ex parte Home* (1885), 54 L. T. 301; and see *Teasdale* v. *Braithwaite* (1877), 5 Ch. D. 630, C. A.; *Montefiore* v. *Behrens* (1865), L. R. 1 Eq. 171; compare *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7 (consideration passing from a husband). For general treatment of the doctrine of equity to a settlement, see title HUSBAND AND WIFE.

(*u*) *Gale* v. *Williamson* (1841), 8 M. & W. 405; *Pott* v. *Todhunter* (1845), 2 Coll. 76; *Leifchild's Case* (1865), L. R. 1 Eq. 231; *Townend* v. *Toker* (1866), 1 Ch. App. 446, 459; *Bayspoole* v. *Collins* (1871), 6 Ch. App. 228, 233; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, 388, C. A. So a deed may be shown to be part of a transaction evidenced by other deeds (*Harman* v. *Richards* (1852), 10 Hare, 81; *Graham* v. *O'Keeffe* (1864), 16 I. Ch. R. 1). See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 439, 446, 449.

(*a*) *Campion* v. *Cotton* (1810), 17 Ves. 263 a; and see *Russel* v. *Hammond* (1738), 1 Atk. 13; *Fraser* v. *Thompson* (1859), 1 Giff. 49, 65, reversed on another point (1859), 4 De G. & J. 659, C. A.

(*b*) *Ibid.*

(*c*) *Fraser* v. *Thompson* (1859), 4 De G. & J. 659, C. A.

(*d*) *Campion* v. *Cotton, supra; Kevan* v. *Crawford* (1877), 6 Ch. D. 29, C. A.

(*e*) *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, C. A.; affirmed, *sub nom. Clough* v. *Samuel*, [1905] A. C. 442.

(*f*) *Colombine* v. *Penhall, Penhall* v. *Miller* (1853), 1 Sm. & G. 228, where the parties had lived together for some years before marriage; *Fraser* v. *Thompson, supra; Re Pennington, Ex parte Cooper* (1888), 59 L. T. 774; compare *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46.

(*g*) *Smith* v. *Cherrill* (1867), L. R. 4 Eq. 390; *Re Cameron and Wells* (1887), 37 Ch. D. 32, 36; and see *Nairn* v. *Prowse* (1802), 6 Ves. 752.

(*h*) *Re Holland, Gregg* v. *Holland, supra;* and see *Warden* v. *Jones* (1857), 2 De G. & J. 76, where there was no contract in writing sufficient to satisfy the Statute of Frauds, so that the ante-nuptial agreement was unenforceable; see, further, *Taylor* v. *Jones* (1743), 2 Atk. 600.

SECT. 2. Protection of Bonâ Fide Purchasers for Value.

no proceedings being taken against the grantor for divorce (*i*), or which contain a covenant by the trustees to indemnify the husband against his wife's debts, are also for sufficient consideration (*k*).

171. Purchasers for value from the grantee are also within the protection of the section if they take without notice of the fraud (*l*), for the alienation by the debtor is good until it is avoided (*m*).

Purchasers from grantee.

SECT. 3.—*Grounds of Impeachment.*

SUB-SECT. 1.—*Fraudulent Intent.*

172. The question of intent to delay, hinder, or defraud creditors is always one of fact, which the court has to decide on the merits of each particular case after taking all the circumstances surrounding the making of the alienation into account (*n*).

Fraudulent intent.

An intention to defeat an expected execution by a particular judgment creditor does not necessarily constitute a fraud within the statute (*o*), but to be valid an alienation made with such intent must be for full value and, as between the debtor and the grantee, a *bonâ fide* transaction (*p*). No title to goods will pass to an assignee thereof where he has had notice that a writ of execution has actually been delivered to the sheriff before the alienation (*q*).

Intent to defeat execution.

Unlike the bankruptcy laws (*r*), the statute does not prohibit a debtor preferring one creditor to another (*s*), and therefore a

Preference.

(*i*) *Hobbs* v. *Hall* (1788), 1 Cox, Eq. Cas. 445; compare *Re Pope, Ex parte Dicksee*, [1908] 2 K. B. 169, C. A.; and see, *contra*, *Fitzer* v. *Fitzer* (1742), 2 Atk. 511.

(*k*) *Stephens* v. *Olive* (1786), 2 Bro. C. C. 90; and see *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538; *Gibbs* v. *Harding* (1870), 5 Ch. App. 336.

(*l*) *George* v. *Milbanke* (1803), 9 Ves. 190; *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31; see also *Noyes* v. *Paterson*, [1894] 3 Ch. 267. Similar protection is given to purchasers from grantees under a grant voidable under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47; see *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, C. A.; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 279.

(*m*) *Morewood* v. *South Yorkshire Rail. and River Dun Co.* (1858), 3 H. & N. 798.

(*n*) *Thompson* v. *Webster* (1859), 4 Drew. 628, 632; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.; compare *O'Connor* v. *Bernard* (1838), 2 Jo. Ex. Ir. 654; *Turnley* v. *Hooper* (1856), 2 Jur. (N. S.) 1081; *Marlow* v. *Orgill* (1862), 8 Jur. (N. S.) 829.

(*o*) Stat. (1571) 13 Eliz. c. 5. See *Wood* v. *Dixie* (1845), 7 Q. B. 892; *Hale* v. *Saloon Omnibus Co.* (1859), 4 Drew. 492, *Darvill* v. *Terry* (1861), 6 H. & N. 807. The personal representative of a deceased debtor has the same right to defeat an execution creditor in this manner as the debtor himself had (*Wolverhampton and Staffordshire Banking Co.* v. *Marston* (1861), 7 H. & N. 148).

(*p*) *Coulston* v. *Gardiner* (1681), reported 3 Swan. 279, n.; *Alton* v. *Harrison*, *Poyser* v. *Harrison* (1869), 4 Ch. App. 622; *Edmunds* v. *Edmunds*, [1904] P. 362, 376; and see *Re Moroney* (1887), 21 L. R. Ir. 27, 55—57, C. A.; *Strong* v. *Strong* (1853), 18 Beav. 408. In determining whether the transaction was *bonâ fide*, the fact that its necessary effect would be to defeat a judgment creditor would incline the court to decide against its validity (*Edmunds* v. *Edmunds*, *supra*, at pp. 375, 376).

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1). See title EXECUTION, Vol. XIV., p. 43.

(*r*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 279.

(*s*) *Holbrid* v. *Anderson* (1793), 5 Term Rep. 235; *Benton* v. *Thornhill* (1816), 7 Taunt. 149; *Alton* v. *Harrison*, *Poyser* v. *Harrison*, *supra*; *Middleton* v. *Pollock*, *Ex parte Elliott* (1876), 2 Ch. D. 104, *per* JESSEL, M.R., at p. 108; *Maskelyne and Cooke* v. *Smith*, [1902] 2 K. B. 158; affirmed, [1903] 1 K. B. 671, C. A.

SECT. 3. Grounds of Impeachment.

conveyance executed in favour of one or some only of the creditors of the grantor may be *bonâ fide* and valid, notwithstanding that the grantor knows at the time that execution is about to be issued against him (*t*), or that he is insolvent (*u*), and even though the conveyance comprises the whole of the grantor's property (*v*). Such an alienation will, however, be avoided if it is a mere cloak to secure a benefit to the grantor (*w*).

Fraud at instigation of grantee.

The fact that the intent to defraud emanates from the grantee and not from the grantor, and that the latter acted only at the instigation of the grantee, does not prevent an alienation being avoided (*x*).

SUB-SECT. 2.—*Evidence of Fraudulent Intent.*

Burden of proof.

173. In an action to set aside an alienation under the statute the onus of proof of actual fraud on the part of the grantor, and that the grantee was privy to the intent, rests upon the plaintiff where the alienation is for valuable consideration (*a*). Where, however, the alienation is voluntary, then on proof that the grantor was at the time of its execution contemplating his entry upon a hazardous business (*b*), or that the natural consequence of the alienation was to delay, hinder, or defraud creditors (*c*), or that the circumstances under which the alienation was effected bore one of the indications or badges of fraud hereafter mentioned (*d*), the onus of upholding the alienation is imposed on the defendants.

Evidence of fraudulent intent.

174. There are a number of circumstances which weigh with the court in determining whether, in any particular case, there was an intent to defraud creditors (*e*). The strongest of these indications, or badges, of fraud is the continuance of the grantor in possession of the property he has purported to alienate, when such continuance in possession is not in accordance with the tenor and object of the conveyance (*f*); and even though the grantee is let into

(*t*) *Alton* v. *Harrison*, *Poyser* v. *Harrison* (1869), 4 Ch. App. 622.

(*u*) *Middleton* v. *Pollock*, *Ex parte Elliott* (1876), 2 Ch. D. 104. The knowledge of the creditor grantee is also immaterial (*ibid.*, at p. 108).

(*v*) *Alton* v. *Harrison*, *Poyser* v. *Harrison*, *supra*.

(*w*) *Ibid*; *Maskeleyne and Cooke* v. *Smith*, [1902] 2 K. B. 158; affirmed, [1903] 1 K. B. 671, C. A.; *Re Sinclair*, *Ex parte Chaplin* (1884), 26 Ch. D. 319, C. A., see the judgment of FRY, L.J., at p. 336, and *Allen* v. *Bonnett* (1870), 5 Ch. App. 577. See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 336.

(*x*) *Cornish* v. *Clark* (1872), L. R. 14 Eq. 184.

(*a*) *Re Johnson*, *Golden* v. *Gillam* (1881), 20 Ch. D. 389, 394, C. A.; *Re Cranston*, *Ex parte Cranston* (1892), 9 Morr. 160; *Re Tetley*, *Ex parte Jeffrey* (1896), 3 Mans. 226, 233; *Re Hirth* (*Carl*), *Ex parte Trustee*, [1899] 1 Q. B. 612, 620, C. A.; *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.; *Re Reis*, *Ex parte Clough*, [1904] 2 K. B. 769, C. A.

(*b*) *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106.

(*c*) *Freeman* v. *Pope* (1870), 5 Ch. App. 538; *Re Wise*, *Ex parte Mercer* (1886), 17 Q. B. D. 290, C. A.; *Re Holland*, *Gregg* v. *Holland*, *supra*; see *Re Tetley*, *Ex parte Jeffrey*, *supra*.

(*d*) See *infra*.

(*e*) As to where the onus of proof lies, see *supra*.

(*f*) *Twyne's Case* (1602), 3 Co. Rep. 80 b; 1 Smith, L. C., 11th ed., 1; *Reed* v. *Blades* (1813), 5 Taunt. 212; *Edwards* v. *Harben* (1788), 2 Term Rep. 587; *Paget* v. *Perchard* (1795), 1 Esp. 205; *Eastwood* v. *Brown* (1825), Ry. & M. 312; and see *Morris* v. *Morris* (1895), 72 L. T. 879, P. C.

possession jointly with the grantor, the presumption of fraud will still be raised (*g*). But continuance in possession is not evidence of fraud where such possession is consistent with the nature of the grant, as in the case of a mortgage (*h*). Again, retention of the title deeds of the property granted is an indication of a fraudulent intent (*i*).

Indebtedness not conclusive evidence.

175. The fact that the grantor was at the time of the alienation indebted to a considerable extent, though not amounting to insolvency, especially if by the alienation he rendered himself unable to meet his then existing liabilities, furnishes very strong evidence of an intent to defraud his creditors (*k*), but such evidence is not conclusive (*l*). In determining the amount of the indebtedness of the grantor, account must be taken of any contingent liability, such as that under a guarantee (*m*), or for damages recovered in an action commenced after the alienation for a tort committed prior to the alienation (*n*), unless the contingency of the grantor being made liable is very remote (*o*); but mortgage debts, where the mortgaged property is a sufficient security, may be disregarded (*p*). It is not, however, necessary for the avoidance of an alienation under the statute that the grantor should be in any way indebted at the time of the alienation (*q*), and a settlement made for the purpose of safeguarding the grantor, or his family, at a time when he is about to enter upon a speculative business, or one of which he has no special knowledge, will be impeachable on that ground alone (*r*).

Indebtedness not essential to invalidity.

(*g*) *Wordall* v. *Smith* (1808), 1 Camp. 332. But this would probably not be so where the grantor and grantee are husband and wife, and the property transferred consists of furniture in the house occupied by both; see *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A.

(*h*) *Reed* v. *Wilmot* (1831), 7 Bing. 577, 583; *Martindale* v. *Booth* (1832), 3 B. & Ad. 498; compare *Alton* v. *Harrison*, *Poyser* v. *Harrison* (1869), 4 Ch. App. 622.

(*i*) *Perry-Herrick* v. *Attwood* (1857), 27 L. J. (CH.) 121.

(*k*) *Townsend* v. *Westacott* (1840), 2 Beav. 340; *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419; *Christy* v. *Courtenay* (1858), 26 Beav. 140; *Freeman* v. *Pope* (1870), 5 Ch. App. 538; *Kent* v. *Riley* (1872), L. R. 14 Eq. 190; *Spirett* v. *Willows* (1865), 12 L. T. 794; *Dennison* v. *Tattersall*, *Dennison* v. *Cropper* (1868), 18 L. T. 303; *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.

(*l*) *Re Wise*, *Ex parte Mercer* (1886), 17 Q. B. D. 290, C. A.; *Re Johnson Golden* v. *Gillam* (1881), 20 Ch. D. 389, C. A.; *Holmes* v. *Penney* (1856), 3, K. & G. 90; but see *Freeman* v. *Pope*, *supra*; and *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106. And see *Re Lane-Fox*, *Ex parte Gimblett*, [1900] 2 Q. B. 508; *Graham* v. *O'Keeffe* (1864), 16 I. Ch. R. 1.

(*m*) *Re Ridler*, *Ridler* v. *Ridler* (1882), 22 Ch. D. 74, C. A.

(*n*) *Crossley* v. *Elworthy* (1871), L. R. 12 Eq. 158.

(*o*) *Re Ridler*, *Ridler* v. *Ridler*, *supra*; and see *Re Wise*, *Ex parte Mercer*, *supra*; *Vyse* v. *Brown* (1884), 13 Q. B. D. 199.

(*p*) *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419, 426; *Re Conibeer*, *Ex parte Huxtable* (1876), 2 Ch. D. 54, C. A.

(*q*) *Stileman* v. *Ashdown* (1742), 2 Atk. 477; *Barling* v. *Bishopp* (1860), 29 Beav. 417; *Thompson* v. *Webster* (1859), 4 Drew. 628, 632.

(*r*) *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106; *Re Butterworth*, *Ex parte Russell* (1882), 19 Ch. D. 588, C. A., *per* JESSEL, M.R., at p. 598: "The principle of *Mackay* v. *Douglas*, and that line of cases, is this, that a man is not entitled to go into a hazardous business and immediately before doing so to settle all his property voluntarily, the object being this 'If I succeed in business

SECT. 3. Grounds of Impeachment.

Other indications.

176. Other indications of a fraudulent intent are: the fact that the alienation comprises substantially the whole of the property of the grantor (*s*); in the case of an alienation of shares, that a call has been made upon them (*t*); that the alienation is made after a writ has been issued against the grantor (*a*), or after execution has been issued (*b*); that the conveyance by which it is effected contains an unnecessary statement to the effect that it was made without a fraudulent intent (*c*); that the conveyance contains a false recital, though this will not be conclusive against a party who did not know that the recital was false (*d*); or that the grantor reserved to himself a power of revocation (*e*).

Interests determinable on bankruptcy.

177. If a settlor settles his own property upon trusts, under which he takes a life interest determinable on bankruptcy, his life interest will pass on his bankruptcy to his trustee, the provision for determination being regarded as a fraud on the bankruptcy law (*f*). The inclusion of such a provision might also lead the court to regard the whole settlement with suspicion in an action to set it aside under the statute (*g*), but will not of itself render the whole settlement fraudulent (*h*). Where the property so settled is that coming to the settlor in right of his wife, the provision for determination on bankruptcy is good under the bankruptcy laws

I make a fortune for myself. If I fail I leave my creditors unpaid. They will bear the loss.' "

(*s*) *Twyne's Case* (1602), 3 Co. Rep. 80 b; 1 Smith, L. C., 11th ed., 1; *Stileman* v. *Ashdown*, (1742), 2 Atk. 477; *Thompson* v. *Webster* (1859), 4 Drew. 628, 633; *Oriental Bank Corporation* v. *Coleman* (1861), 4 L. T. 9; *Ware* v. *Gardner* (1869), L. R. 7 Eq. 317; *Re Troughton, Rent and General Collecting and Estate Co.* v. *Troughton* (1894), 71 L. T. 427; *Re Hirth (Carl), Ex parte Trustee*, [1899] 1 Q. B. 612, 620, C. A.; but see *Alton* v. *Harrison*, *Poyser* v. *Harrison* (1869), 4 Ch. App. 622.

(*t*) *Re Troughton, Rent and General Collecting and Estate Co.* v. *Troughton, supra.*

(*a*) *Twyne's Case, supra; Empringham* v. *Short* (1844), 3 Hare, 461; *Blenkinsopp* v. *Blenkinsopp* (1852), 1 De G. M. & G. 495, C. A.; *Re Moroney* (1887), 21 L. R. Ir. 27, C. A.; *Barling* v. *Bishopp* (1860), 29 Beav. 417; *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46; but see *Re Wise, Ex parte Mercer* (1886), 17 Q. B. D. 290, C. A.; *Alton* v. *Harrison*, *Poyser* v. *Harrison, supra.*

(*b*) *Bott* v. *Smith* (1856), 21 Beav. 511; compare *Wood* v. *Dixie* (1845), 7 Q. B. 892; *Hale* v. *Saloon Omnibus Co.* (1859), 4 Drew. 492; *Edmunds* v. *Edmunds*, [1904] P. 362, where the assignments were held valid as being *bonâ fide* and for value.

(*c*) *Twyne's Case, supra.*

(*d*) *Penhall* v. *Elwin* (1853), 1 Sm. & G. 258; *Kevan* v. *Crawford* (1877), 6 Ch. D. 29, C. A.

(*e*) *Holcroft's Case* (1596), Moore (K. B.), 486; *Tarback* v. *Marbury* (1705), 2 Vern. 510; *Middlecome* v. *Marlow* (1742), 2 Atk. 519; *Smith* v. *Hurst* (1852), 10 Hare, 30, 44; *Acraman* v. *Corbett* (1861), 1 John. & H. 410; *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419, 427; *Re Lane-Fox, Ex parte Gimblett*, [1900] 2 Q. B. 508.

(*f*) *Higinbotham* v. *Holme* (1811), 19 Ves. 88; *Re Brewer's Settlement, Morton* v. *Blackmore*, [1896] 2 Ch. 503; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 151. *Secus*, where the life interest is determinable on a voluntary alienation (*Brooke* v. *Pearson* (1859), 27 Beav. 181), or on an involuntary alienation other than bankruptcy and the clause has taken effect before the bankruptcy (*Re Detmold, Detmold* v. *Detmold* (1889), 40 Ch. D. 585).

(*g*) *Murphy* v. *Abraham* (1864), 15 I. Ch. R. 371.

(*h*) *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, 372, 386, C. A.; overruling *Re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807.

and, further, raises no presumption of a fraudulent intent under the statute (*i*).

SECT. 3. Grounds of Impeachment.

The mere fact that the settlor reserves, or may derive, some benefit under a settlement will not affect its validity (*k*).

SECT. 4.—*Who can avoid Alienations under the Statute.*

Not voidable by grantor or persons claiming under him.

178. Although alienations made with intent to delay, hinder, or defraud creditors are voidable as against creditors and persons claiming through them, such alienations are valid in all other respects and against all other persons. Where such alienations are made by deed they cannot be impeached by the grantor (*l*), by his personal representatives after his death (*m*), by his committee after his lunacy (*n*), nor by any other persons deriving title under him (*o*), the grant being good as against all third parties other than creditors (*p*). Where, however, the alienation is by delivery of goods and is in fact a mere pretence, and no purchase-money is paid although a receipt is signed for it, the grantor may recover the goods from the grantee in an action in trover (*q*).

Effect of release and acquiescence.

179. A creditor's right to relief is not lost by a release of the debt if procured by the debtor without disclosing the existence of property comprised in a voidable settlement (*r*). A creditor may impeach one part of a fraudulent transaction although he takes a benefit under another part (*s*); but creditors who have acquiesced in the grantor making the alienation, and persons deriving title under them, have no right to set aside the alienation, for they cannot be said to have been defrauded thereby (*t*). Similarly, a creditor who has represented the alienation which is impeached as valid to a third party is disentitled to the relief given by the statute, even though the third party has not acted on the representation (*u*).

Subsequent creditors.

180. With the above exceptions, all creditors who have been delayed, hindered, or defrauded by the alienation, whether their debts were owing at the date it was made or were incurred

(*i*) *Higinbotham* v. *Holme* (1811), 19 Ves. 88, 92; *Montefiore* v. *Behrens* (1865), L. R. 1 Eq. 171; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.

(*k*) *Holloway* v. *Millard* (1816), 1 Madd. 414, 421; *Holmes* v. *Penney* (1856), 3 K. & J. 90, 100.

(*l*) *Petre* v. *Espinasse* (1834), 2 My. & K. 496; *Bill* v. *Cureton* (1835), 2 My. & K. 503; *Paul* v. *Paul* (1882), 20 Ch. D. 742, C. A.; and see *Curtis* v. *Price* (1805), 12 Ves. 89, 103; *Tanqueray* v. *Bowles* (1872), L. R. 14 Eq. 151, 157; *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275.

(*m*) *Hawes* v. *Leader* (1611), Cro. Jac. 270; *Orlabar* v. *Harwar* (1695), Comb. 348.

(*n*) *Colman* v. *Croker* (1790), 1 Ves. 160.

(*o*) *Robinson* v. *M'Donnell* (1818), 2 B. & Ald. 134.

(*p*) *Bessey* v. *Windham* (1844), 6 Q. B. 166.

(*q*) *Bowes* v. *Foster* (1858), 2 H. & N. 779. See also title TROVER AND DETINUE.

(*r*) *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106; and see *Tanqueray* v. *Bowles* (1872), L. R. 14 Eq. 151. As to delay in taking legal proceedings, see p. 89, *post*.

(*s*) *French* v. *French* (1855), 6 De G. M. & G. 95, 102.

(*t*) *Olliver* v. *King* (1856), 8 De G. M. & G. 110, C. A.; *Steel* v. *Brown* (1808), 1 Taunt. 381; and see *Bamford* v. *Baron* (1788), 2 Term Rep. 594, n.

(*u*) *Myers* v. *Leinster* (*Duke*) (1844), 7 I. Eq. R. 146, 166.

SECT. 4.
Who can avoid Alienations under the Statute.

subsequently thereto, may avoid the alienation and share in the distribution of the property comprised therein (*v*).

Although subsequent creditors have the same right to set aside an alienation made with intent to delay, hinder, or defraud them as creditors whose debts were due at the date of the alienation, they have a more difficult task than the latter class of creditors in proving a fraudulent intent on the part of the grantor in the case of a voluntary settlement. In such case they must prove either an express intent to delay, hinder, or defraud creditors, or that after the settlement the grantor had no sufficient means or reasonable expectation of being able to pay his then existing debts (*w*).

Voluntary creditors.

181. A voluntary creditor under an instrument under seal ranks as a creditor within the statute, even though his debt is not payable at the time the alienation is sought to be set aside, as in the case of a creditor under a *post-obit* bond (*x*).

Trustee in bankruptcy.

182. The trustee in bankruptcy can impeach the bankrupt's fraudulent alienation made before bankruptcy (*y*), and a fraudulent conveyance either within the statute, or one that is taken out of the scope of the statute only by the fact that the grantee was not privy to the fraudulent intent (*a*), is itself an act of bankruptcy (*b*).

(*v*) *Richardson* v. *Smallwood* (1822), Jac. 552; *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419; *Ware* v. *Gardner* (1869), L. R. 7 Eq. 317; *Crossley* v. *Elworthy* (1871), L. R. 12 Eq. 158; *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106; *Taylor* v. *Coenen* (1876), 1 Ch. D. 636; *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588, C. A. In *Jenkyn* v. *Vaughan, supra*, at p. 425, KINDERSLEY, V.-C., raised the question whether, in a case where the only evidence of fraudulent intent lay in the fact that the grantor was at the time of the settlement indebted to some extent, and where all the debts existing at the date of the alienation had been paid off before a subsequent creditor instituted proceedings to avoid the settlement, such creditor was not prevented from succeeding by the fact that the only evidence of the fraudulent intent had been removed by the grantor having paid the debts owing at the time of the settlement. This question does not appear to have been decided yet, but it is submitted that in such circumstances a subsequent creditor might succeed, for the property passing from the creditor may well have been used by the grantor in payment of debts owing at the time of the settlement, the grantor thus in effect only substituting one creditor for another without reducing the amount of his indebtedness. This would certainly be the case if the grantor paid off the creditors existing at the time of the settlement, with the intention of taking the settlement out of the operation of the statute; see *Richardson* v. *Smallwood, supra*; *Holmes* v. *Penney* (1856), 3 K. & J. 90, 100; *Lush* v. *Wilkinson* (1800), 5 Ves. 384; *Whittington* v. *Jennings* (1834), 6 Sim. 493.

(*w*) *Spirrett* v. *Willows* (1864), 3 De G. J. & Sm. 293; *Re Lane-Fox, Ex parte Gimblett*, [1900] 2 Q. B. 508; *Mackay* v. *Douglas, supra*; and see *Holloway* v. *Millard* (1816) 1 Madd. 414; *Martyn* v. *M'Namara* (1843), 4 Dr. & War. 411, 427; *Taylor* v. *Coenen, supra*; *Freeman* v. *Pope* (1870), 5 Ch. App. 538; *Crossley* v. *Elworthy, supra*; *Re Wise, Ex parte Mercer* (1886), 17 Q. B. D. 290, C. A.; compare *Russel* v. *Hammond* (1738), 1 Atk. 13; *Kidney* v. *Coussmaker* (1806), 12 Ves. 136, 155; *Battersbee* v. *Farrington* (1818), 1 Swan. 106.

(*x*) *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468, where it was also held that covenants for title in the disposition did not enable a claim to be made in competition with the creditors. As to *post-obit* bonds, see title BONDS, Vol. III., pp. 82, 94.

(*y*) *Doe* d. *Grimsby* v. *Ball* (1843), 11 M. & W. 531; *Billiter* v. *Young* (1856), 6 E. & B. 1, 17, Ex. Ch.; and see *Davis* v. *Snell* (1860), 3 L. T. 394; *Re Harrison, Ex parte Butters* (1880), 14 Ch. D. 265, C. A.; *Re Butterworth, Ex parte Russell, supra*.

(*a*) See p. 81, *ante*.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1); see title BANKRUPTCY

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183. A fraudulent bill of sale and a judgment fraudulently obtained are void under the statute as against the sheriff executing a writ of *fieri facias*, as he acts in right of a creditor (*c*). It is consequently the duty of the sheriff to seize goods comprised in such a bill of sale and remaining in the judgment debtor's possession, or in the possession of a sheriff's officer put into possession under a prior fraudulent judgment (*d*).

Sheriff.

SECT. 5.—*Remedies, Practice, and Penalties.*

SUB-SECT. 1.—*Remedies and Practice.*

Parties to proceedings.

184. In an action to set aside an alienation under the statute a creditor should sue on behalf of himself and all other the creditors of the grantor (*e*), except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation void as against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts (*f*).

If the grantor has become bankrupt, his trustee in bankruptcy is the proper person to institute such proceedings (*g*), but a creditor may do so if the trustee in bankruptcy refuses to act (*h*). A bankrupt grantor is not a proper party to proceedings of this nature instituted by his trustee in bankruptcy (*i*).

The court will set aside an alienation at the instance of a creditor before he has recovered a judgment in respect of his debt (*k*).

A creditor suing under the statute will not be delayed by an inquiry being ordered to ascertain whether the grantor has not assets sufficient to satisfy the debt other than such as were included in the alienation impeached (*l*).

Delay in enforcing remedy.

185. The right given to creditors by the statute to have fraudulent alienations set aside so far as is necessary to satisfy their claims, being a legal right, is not lost by their delay in enforcing it so long as their debts are not barred under the Statutes of Limitation (*m*).

AND INSOLVENCY, Vol. II., p. 16; and see *Re Hirth* (*Carl*), *Ex parte Trustee*, [1899] 1 Q. B. 612, C. A.

(*c*) *Turvil* v. *Tipper* (1627), Lat. 222; *Paget* v. *Perchard* (1794), 1 Esp. 205; *Imray* v. *Magnay* (1843), 11 M. & W. 267.

(*d*) *Lovick* v. *Crowder* (1828), 8 B. & C. 132; *Imray* v. *Magnay*, *supra*. As to duties of sheriff, generally, see titles EXECUTION, Vol. XIV., p. 21; SHERIFFS AND BAILIFFS.

(*e*) *Reese River Silver Mining Co.* v. *Atwell* (1869), L. R. 7 Eq. 347.

(*f*) *Smith* v. *Hurst* (1852), 10 Hare, 30 (for form of order, see *ibid.*, at p. 50); *Spirett* v. *Willows* (1865), 11 Jur. (N. S.) 70; *Neale* v. *Day* (1858), 28 L. J. (CH.) 45; *Blenkinsopp* v. *Blenkinsopp* (1852), 1 De G. M. & G. 495, C. A. An alienation may also be held bad on interpleader proceedings, without any action to set it aside or formal declaration that it is void; see title INTERPLEADER. As to practice on obtaining judgment, see title JUDGMENTS AND ORDERS.

(*g*) *Doe* d. *Grimsby* v. *Ball* (1843), 11 M. & W. 531; *Re Harrison*, *Ex parte Butters* (1880), 14 Ch. D. 265, C. A.; *Re Butterworth*, *Ex parte Russell* (1882), 19 Ch. D. 588, C. A.

(*h*) *Re Genese*, *Ex parte Kearsley* (1886), 17 Q. B. D. 1.

(*i*) *Weise* v. *Wardle* (1874), L. R. 19 Eq. 171.

(*k*) *Goldsmith* v. *Russell* (1855), 5 De G. M. & G. 547; *Reese River Silver Mining Co.* v. *Atwell*, *supra*, not following *Colman* v. *Croker* (1790), 1 Ves. 160.

(*l*) *Chamley* v. *Dunsany* (*Lord*) (1807), 2 Sch. & Lef. 690, 714, H. L.

(*m*) *Re Maddever*, *Three Towns Banking Co.* v. *Maddever* (1884), 27 Ch. D. 523,

SECT. 5. Remedies, Practice, and Penalties.

186. Where the alienation sought to be impeached is in the form of a settlement under which a third party has a power of disposition, he may be restrained until after trial from exercising his power even in favour of a purchaser for value (*n*).

Interlocutory injunction.

Form of order.

187. Where a conveyance is set aside under the statute the proper form of order, unless the court is satisfied that nothing can in any possible event come to the grantee after the creditors have been paid, is not that the conveyance be delivered up to be cancelled, but that the grantee shall do all things necessary to make the property comprised in the alienation available for satisfying the claims of the creditors (*o*). The court may direct a sale of so much of the property comprised in the conveyance as will be required to satisfy the claims of the creditors, or, where such a course is more convenient, of the whole of the property (*p*). Creditors are not entitled to an account of the rents and profits of such property received by the grantor before the conveyance is set aside (*a*).

Following property.

188. Where property comprised in the fraudulent alienation has been converted, the creditors may follow it, and the court will in a proper case exact an undertaking from the grantee or assignee not to deal with it pending the trial of the creditor's action (*b*).

Where the grantor is dead the grantee will be an executor *de son tort* of the grantor in respect of the property comprised in the fraudulent alienation which is in his hands (*c*).

Administration action.

The court will decree administration of the estate of a deceased grantor in an action by a creditor (*d*), and where an administration order has already been made, any creditor who has leave to attend the proceedings may, in a proper case, obtain an order for an

C. A. Thus, a trustee in bankruptcy has set aside an alienation after the lapse of eighteen years (*Re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807); see also title LIMITATION OF ACTIONS.

(*n*) *Beyfus* v. *Bullock* (1869), L. R. 7 Eq. 391.

(*o*) *Ideal Bedding Co. Ltd.* v. *Holland*, [1907] 2 Ch. 157; and see 3 Seton, Judgments and Orders, 6th ed., p. 2346, No. 3. For a case where the deed was cancelled, see *Tarleton* v. *Liddell* (1851), 17 Q. B. 390. As to setting aside part of a transaction, and as to preserving the rights of a volunteer in regard to any surplus, see *French* v. *French* (1855), 6 De G. M. & G. 95. As to preserving the rights of persons having priority over the creditors, see *Blenkinsopp* v. *Blenkinsopp* (1850), 12 Beav. 568; affirmed (1852), 1 De G. M. & G. 495, C. A.; *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31, 40. As to practice on drawing up orders, see title JUDGMENTS AND ORDERS.

(*p*) *Curtis* v. *Price* (1805), 12 Ves. 89, 103; compare *Halifax Joint Stock Banking Co.* v. *Gledhill*, *supra*.

(*a*) *Higgins* v. *York Buildings Co.* (1740), 2 Atk. 106.

(*b*) *Re Mouat, Kingston Cotton Mills Co.* v. *Mouat*, [1899] 1 Ch. 831, where proceeds of a policy fraudulently assigned had been invested with other money on mortgage; compare *Smith* v. *Hurst* (1845), 1 Coll. 705; S. C. (1852), 10 Hare, 30, where a receiver was appointed of the assigned property.

(*c*) *Bethell* v. *Stanhope* (1601), Cro. Eliz. 810; *Hawes* v. *Leader* (1611), Cro. Jac. 270; *Shears* v. *Rogers* (1832), 3 B. & Ad. 362, 370; *Shee* v. *French*, *French* v. *French* (1857), 3 Drew. 716; *Re Mouat, Kingston Cotton Mills Co.* v. *Mouat*, *supra*; see *Hue* v. *French* (1857), 26 L. J. (CH.) 317. As to executors *de son tort*, generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 147 *et seq.*

(*d*) *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468; *Taylor* v. *Coenen* (1876), 1 Ch. D. 636. As to administration of estates of deceased persons generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 333 *et seq.*

inquiry whether the deceased had settled any and what property, and whether such settlement was void as against his creditors (*e*).

Costs.

189. When a settlement is set aside under the statute it is in the discretion of the court to allow the trustees their costs of the proceedings, even where there is no property remaining subject to the trusts of the settlement after the creditors' claims have been satisfied (*f*). Although there are several cases in which the trustees have not been allowed their costs (*g*), it would appear that the court is in general loth to refuse costs to trustees who have not actually been parties to the fraudulent intent of the settlor (*h*). Where costs are allowed the trustees at all, they will be allowed as between solicitor and client (*i*).

SUB-SECT. 2.—*Statutory Penalties.*

Penalties and persons liable thereto.

190. All parties to any alienation within the scope of the statute and all persons privy thereto who maintain such an alienation, or alien the property conveyed to them thereby, are liable to a penalty of one year's value of the property alienated if realty or chattels real, and the whole value of the property alienated if personalty, and to imprisonment for half a year (*k*). The penalty is not the consideration money for the alienation (*l*), nor the amount of the debt due to the creditor aggrieved by the alienation (*m*), and is recoverable from every person party or privy to the alienation and not merely from one of such persons (*n*). Half of the penalty is forfeited to the Crown, and half to the parties aggrieved by the alienation (*o*). Knowledge on the part of a grantee that the alienation was made by his grantor with intent to defeat creditors is not enough to bring him within the forfeiture section of the statute if he gave valuable consideration and there was no fraudulent intent on his part (*p*).

(*e*) *Re Ridler, Ridler* v. *Ridler* (1882), 22 Ch. D. 74, C. A.

(*f*) *Dutton* v. *Thompson* (1883), 23 Ch. D. 278, C. A.

(*g*) See *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106; *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588, C. A.

(*h*) *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468; *Cornish* v. *Clark* (1872), L. R. 14 Eq. 184, 190 (where see form of order); *Taylor* v. *Coenen* (1876), 1 Ch. D. 636, 642; *Merry* v. *Pownall*, [1898] 1 Ch. 306; *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157.

(*i*) *Ibid.*

(*k*) Stat. (1571) 13 Eliz. c. 5, s. 2 (s. 3 in statutes at large). See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 704. To be liable to the penalty it seems that a defendant must be proved not only to have been a party or privy to the fraudulent alienation, and to have maintained it, but also to have been a party to fraudulent intent. Otherwise all beneficiaries under and trustees of voluntary settlements coming within the scope of the statute would be liable, although innocent of the fraud (see *Jones* v. *Boulter* (1786), 1 Cox, Eq. Cas 288, 295; *Doe* d. *Watson* v. *Routledge* (1777), 2 Cowp. 705, 710; *Olliver* v. *King* (1856), 8 De G. M. & G. 110, C. A., *per* TURNER, L.J., at p. 117; *Lynch* v. *Copinger* (1866), 14 W. R. 863).

(*l*) *Butcher* v. *Harrison* (1832), 4 B. & Ad. 129.

(*m*) *Creswell and Coke's Case* (1577), 2 Leon. 8.

(*n*) *Boulton* v. *Wiseman* (1614), Noy, 105. This case was one upon the corresponding section of the stat. (1584-5) 27 Eliz. c. 4, as to which see p. 94, *post*; but the principle appears to apply to forfeitures under both statutes.

(*o*) Stat. (1571) 13 Eliz. c. 5, s. 2 (s. 3 in statutes at large).

(*p*) *Lynch* v. *Copinger, supra*; and see *Wood* v. *Dixie* (1845), 7 Q. B. 892.

SECT. 5. Remedies, Practice, and Penalties.

Although the right to set aside an alienation may have been lost by the property having passed into the hands of a *bonâ fide* purchaser for value, the parties aggrieved by the alienation will still be able to exercise the remedy conferred by the penalty clause of the statute (*q*). The trustee in bankruptcy of the fraudulent grantor may sue for the penalty as being a "party grieved" (*r*).

Criminal proceedings.

Proceedings may be taken against an offender under the statute by indictment, and that before any civil proceedings to recover the penalty have been taken (*s*).

Part II.—Conveyances Impeachable by Subsequent Purchasers.

SECT. 1.—*Effect of the Statute* 27 *Eliz. c.* 4, *and of the Voluntary Conveyances Act,* 1893 (*t*).

Effect of statute 27 Eliz. c. 4.

191. By the statute 27 Eliz. c. 4 all conveyances of lands or other hereditaments are rendered void, as against subsequent purchasers for valuable consideration of any interest in the same lands or other hereditaments, if made for the purpose of defrauding such subsequent purchasers (*a*), or if there is thereby reserved a power of revocation to the grantor at his pleasure, and such power has not been exercised before the conveyance to such subsequent purchasers (*b*). Conveyances made *bonâ fide* for good consideration are expressly excepted from the operation of this statute (*c*).

Voluntary conveyances.

192. Although the statute 27 Eliz. c. 4 does not expressly refer to voluntary conveyances, the courts from early times regarded all voluntary conveyances as such as within its scope (*d*), holding that the mere fact that a voluntary grantor subsequently conveyed the same lands to a purchaser for value was conclusive proof that at

(*q*) Stat. (1571) 13 Eliz. c. 5, s. 2 (s. 3 in statutes at large). See p. 91, *ante*.
(*r*) *Butcher* v. *Harrison* (1832), 4 B. & Ad. 129.
(*s*) *R.* v. *Smith* (1852), 6 Cox, C. C. 31.
(*t*) 56 & 57 Vict. c. 21.
(*a*) Stat. (1584-5) 27 Eliz. c. 4, s. 1. This statute was made perpetual by the stat. (1597) 39 Eliz. c. 18. (The corresponding Irish statute is stat. (1634) 10 Car. 1, sess. 2, c. 3). It would appear from *Upton* v. *Basset* (1595), Cro. Eliz. 445 (see also 1 Smith, L. C., 11th ed., p. 8), that the stat. (1584-5) 27 Eliz. c. 4, extended the provisions of the common law against fraud. In that case it was said that "at the common law there was not any fraud remedied which should defeat an after purchase, but that only which was committed to defraud a former interest" (*ibid., per* YELVERTON, J., at p. 445). In *Cadogan* v. *Kennett* (1776), 2 Cowp. 432, Lord MANSFIELD, at p. 434, seems, however, to have been of opinion that the common law would have attained the same results as those provided for by the stat. (1584-5) 27 Eliz. c. 4 without the assistance of the legislature.
(*b*) Stat. (1584-5) 27 Eliz. c. 4, s. 4 (s. 5 in statutes at large); see pp. 101, 102, *post*.
(*c*) Stat. (1584-5) 27 Eliz. c. 4, s. 3 (s. 4 in statutes at large).
(*d*) *Bovy's* (*Sir Ralph*) *Case* (1672), 1 Vent. 193; and see Lord ELLENBOROUGH'S judgment in *Doe* d. *Otley* v. *Manning* (1807), 9 East, 59, at pp. 61—71, and the cases therein cited.

SECT. 1.
Effect of the Statute 27 Eliz. c. 4 etc.

the time of making the voluntary grant he intended to defraud the person who might purchase subsequently (*e*). These decisions, therefore, left it open to a voluntary grantor to defeat his own grant at any subsequent time, however honestly the grant might have been made originally, and no voluntary grantee, however strong the moral obligation imposed on his grantor to support his grant might be, had any security of tenure during the life of the latter (*f*).

Voluntary Conveyances Act, 1893.

To remove this anomaly the Voluntary Conveyances Act, 1893 (*g*), provided that no purchase for value made after the passing of that Act (*h*) should defeat a prior voluntary conveyance of the same lands or hereditaments if in fact such voluntary conveyance had been made *bonâ fide* and without any fraudulent intent (*i*).

The Voluntary Conveyances Act, 1893, does not repeal the statute 27 Eliz. c. 4, but merely clears away the judicial interpretations which would appear to have gone far beyond the construction that would naturally be placed upon the terms of the earlier statute (*j*) : further, the above provisions as to conveyances reserving a power of revocation (*k*) remain unaffected.

Joint effect of the two statutes.

The joint effect of both statutes is as follows:—(1) A conveyance made with an actual intent to defraud subsequent purchasers is void as against them; (2) a grant in which a power of revocation is reserved cannot stand as against a subsequent purchaser, although the power of revocation has not in fact been exercised by the grantor; (3) a subsequent purchaser whose title dates prior to 30th June, 1893, and persons claiming through him, have the same superiority of title over prior voluntary grantees as they had under the old decisions, which included all voluntary conveyances within the scope of the statute 27 Eliz. c. 4; (4) a subsequent purchaser for value whose title dates after 29th June, 1893, has no superiority of title over a precedent voluntary grant if such voluntary grant was made *bonâ fide* and without fraudulent intent (*l*).

(*e*) See *Re Barker's Estate, Jones* v. *Bygott, Bygott* v. *Hillard* (1875), 44 L. J. (CH.) 487, *per* JESSEL, M.R., at p. 489: "The doctrine being that however honest as this (grant) was—for in truth it was an attempt to repair the consequences of a dishonest act by the person who had committed it—yet in contemplation of law the person who has executed the voluntary deed and at any time after conveys away the estate, although he gives notice to the purchaser of the voluntary deed, is presumed to have had in his mind at the time of executing the voluntary deed a fraudulent intent, that is an intent to cheat the purchaser who bought the estate afterwards, with notice of the voluntary deed and of the whole transaction." And see *Townshend* (*Lord*) v. *Windham* (1750), 2 Ves. Sen. 1, *per* Lord HARDWICKE, L.C., at p. 10.

(*f*) See pp. 100, 101, *post*, as to the effect of subsequent conveyances by any person other than the voluntary grantor.

(*g*) 56 & 57 Vict. c. 21.

(*h*) 29th June, 1893.

(*i*) As to stamp duties on voluntary dispositions, see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74; and titles REVENUE; SETTLEMENTS.

(*j*) *Doe* d. *Otley* v. *Manning* (1807), 9 East, 59, *per* Lord ELLENBOROUGH, C.J., at pp. 65—70; *Re Barker's Estate, Jones* v. *Bygott, Bygott* v. *Hillard, supra.*

(*k*) *I.e.*, stat. (1584-5) 27 Eliz. c. 4, s. 4 (s. 5 in statutes at large). See pp. 101, 102, *post.*

(*l*) It will be noticed that the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), does not affect titles depending upon conveyances for valuable consideration made subsequently to voluntary conveyances of the same lands, but before the passing of that Act. This fact renders a knowledge of the law as it

SECT. 1. Effect of the Statute 27 Eliz. c. 4 etc.

193. The statute 27 Eliz. c. 4 applies to conveyances of all interests in land, whether legal or equitable (*m*), including copyholds (*n*), leaseholds (*o*), rentcharges (*p*), and advowsons (*q*), but grants of personal property other than leaseholds are not affected (*r*).

Property within 27 Eliz. c. 4. Penalties.

194. The statute further imposes a forfeiture of one year's value of the lands fraudulently alienated or charged, and a punishment of half a year's imprisonment, upon all parties to or persons privy to any alienation within the mischief of the statute, who shall maintain it against a purchaser or persons claiming under him; one half of the penalty being payable to the Crown, and the other half to the persons aggrieved by the alienation (*s*).

SECT. 2.—*Fraudulent Intent and Proof thereof.*

SUB-SECT. 1.—*Since 29th June*, 1893.

Conveyances with actual intent to defraud.

195. A purchaser whose title dates subsequently to 29th June, 1893, can avoid a prior conveyance of the lands sold to him only when such conveyance was executed with an actual intent to defraud a subsequent purchaser (*t*).

The question of the presence or absence of actual fraud is one of fact, to be determined having regard to the circumstances surrounding the execution of each conveyance sought to be impeached (*a*). The fact that the grantor remained in the

stood before 1893 of importance in the investigation of titles, but it has not been thought necessary in the circumstances to cite all the cases relating to that law.

(*m*) *Barton* v. *Vanheythuysen*, *Stone* v. *Vanheythuysen* (1853), 11 Hare, 126. Where a person contracts to purchase an estate in lands, but directs the conveyance to be made to a third party, and subsequently conveys the property away for valuable consideration, he has acquired by his contract with his vendor an equitable interest in the lands, and the subsequent purchaser from him can defeat the conveyance made to the third party at his direction.

(*n*) *Doe* d. *Tunstill* v. *Bottriell* (1833), 5 B. & Ad. 131; *Currie* v. *Nind* (1836), 1 My. & Cr. 17; contrast *Mathews* v. *Feaver* (1786), 1 Cox, Eq. Cas. 278. As to copyholds, generally, see title COPYHOLDS, Vol. VIII., p. 1.

(*o*) *Goodright* d. *Humphreys* v. *Moses* (1775), 2 Wm. Bl. 1019, unless the assignee incurs liability by reason of the assignment; see p. 96, *post*. As to leaseholds, generally, see title LANDLORD AND TENANT.

(*p*) *Garth* v. *Ersfeild* (1616), J. Bridg. 22. As to rentcharges, generally, see title RENTCHARGES AND ANNUITIES.

(*q*) *Hill* v. *Exeter* (*Bishop*) (1809), 2 Taunt. 69. As to advowsons, generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 564 *et seq*.

(*r*) *Jones* v. *Croucher* (1822), 1 Sim. & St. 315; *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31, 37.

(*s*) Stat. (1584-5) 27 Eliz. c. 4, s. 2 (s. 3 in statutes at large). A person who was a party or privy to an alienation which was within the statute, merely because it was voluntary, was not subject to the penalty or punishment (*Doe* d. *Watson* v. *Routledge* (1777), 2 Cowp. 705, 710; see also *Jones* v. *Boulter* (1786), 1 Cox, Eq. Cas. 288, 295). See further, on this section, *Boulton* v. *Wiseman* (1614), Noy, 105, and cases on the corresponding section of stat. (1571) 13 Eliz. c. 5; see also p. 91, *ante*.

(*t*) Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21); see p. 93, *ante*. As to proof and investigation of title on sale of land, generally, see title SALE OF LAND.

(*a*) *Lloyd* v. *Attwood*, *Attwood* v. *Lloyd* (1859), 3 De G. & J. 614, 654 C. A.; and see *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.

SECT. 2. Fraudulent Intent and Proof thereof.

possession of the lands conveyed (*b*), or of the title deeds (*c*), contrary to the purport of the grant, or that the grant was never communicated to the grantee (*d*), or was otherwise made in a secret manner (*e*), raises a *primâ facie* case of fraud. If a settlor, having reserved to himself a beneficial interest by his settlement, provides by a separate deed that that interest shall determine on any alienation by him, and that thereupon a new interest shall be limited for his benefit, the transaction cannot be other than fraudulent (*f*).

Effect of notice.

The fact that the subsequent purchaser has had notice of the prior conveyance does not preclude him from avoiding it (*g*).

SUB-SECT. 2.—*Before 30th June*, 1893.

Intent presumed because voluntary.

196. As against a purchaser whose title dates prior to 30th June, 1893, all voluntary conveyances of the same lands previously made by his vendor are, with the exception of conveyances for the benefit of charities (*h*), but not excepting conveyances made to the Crown (*i*), void, though apart from the fact that they were voluntary there may have been no suspicion of fraud attending their creation (*k*).

Valuable consideration necessary to support conveyance.

To support a conveyance against such a purchaser there must be some valuable consideration, and the fact that it was made in pursuance of a moral obligation, as, for instance, for the purpose of providing for the wife and children of the grantor, will not avail (*l*).

What is sufficient.

The smallest *quantum* of consideration is, however, deemed sufficient to take the prior conveyance out of the scope of the

(*b*) *Burrel's Case* (1608), 6 Co. Rep. 72; *Smith* v. *Fellows* (1740), 2 Atk. 61.

(*c*) *Perry-Herrick* v. *Attwood* (1858), 2 De G. & J. 21; *Lloyd* v. *Attwood*, *Attwood* v. *Lloyd* (1859), 3 De G. & J. 614, 654.

(*d*) *Cracknall* v. *Janson* (1879), 11 Ch. D. 1.

(*e*) *Burrel's Case*, *supra*; but see *Colvile* v. *Parker* (1607), Cro. Jac. 158; *Griffin* v. *Stanhope* (1617), Cro. Jac. 454; *Prodgers* v. *Langham* (1663), 1 Sid. 133; Preston's note to Sheppard's Touchstone, p. 64: "Concealment and secrecy are only evidence of fraud, and therefore the presumption arising from such evidence may be rebutted by proving that the deed was made *bonâ fide*, and on good" (*i.e.*, valuable) "consideration."

(*f*) *Phipps* v. *Ennismore* (*Lord*) (1829), 4 Russ. 131; see *Knight* v. *Browne* (1861), 7 Jur. (N. S.) 894.

(*g*) *Gooch's Case* (1590), 5 Co. Rep. 60 a. The prior conveyance is avoided, *ab initio*, by the stat. (1584-5) 27 Eliz. c. 4, and therefore notice to the subsequent purchaser is immaterial, the maxim "*non decipitur qui scit se decipi*" having no application.

(*h*) *Ramsay* v. *Gilchrist*, [1892] A. C. 412, P. C., *per* Lord SELBORNE, L.C., at p. 415: "The presumption is that a gift to a charity is charitable and not fraudulent, and therefore *primâ facie* not to be treated as covinous"—within the meaning of the statute; see also *Newcastle-upon-Tyne Corporation* v. *A.-G.* (1845), 12 Cl. & Fin. 402, H. L.

(*i*) *Magdalen College, Cambridge, Case* (1615), 11 Co. Rep. 66 b, 74 a, b.

(*k*) See the cases cited in Lord ELLENBOROUGH'S judgment in *Doe* d. *Otley* v. *Manning* (1807), 9 East, 59; *Buckle* v. *Mitchell* (1812), 18 Ves. 100; *Clarke* v. *Wright* (1861), 6 H. & N. 849, 875, Ex. Ch.; *Re Barker's Estate*, *Jones* v. *Bygott*, *Bygott* v. *Hillard* (1875), 44 L. J. (CH.) 487; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, 504, P. C. See, as to actual fraudulent intent, p. 94, *ante*.

(*l*) *Goodright* d. *Humphreys* v. *Moses* (1775), 2 Wm. Bl. 1019; *Chapman* d. *Staverton* v. *Emery* (1775), 1 Cowp. 278; *Doe* d. *Otley* v. *Manning*, *supra*; *Clarke* v. *Wright* (1861), 6 H. & N. 849, 860, Ex. Ch.; *Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486, 499; and see *Stiles* v. *A.-G.* (1740), 2 Atk. 152.

SECT. 2. Fraudulent Intent and Proof thereof.

statute (*m*). Thus a settlement of leaseholds is not voluntary for the purposes of the statute 27 Eliz. c. 4 if the grantee thereunder incurs any liability in respect of the payment of rent or of the covenants to be performed on the part of the lessee (*n*). If, however, the leaseholds are settled by way of sub-demise, and the settlor remains liable for payment of the rent and performance of the covenants, the settlement will be voluntary (*o*); and if freeholds and leaseholds are conveyed by the same deed, the liability in respect of the leaseholds would probably not be deemed a sufficient consideration to support the conveyance of the freeholds (*p*). A covenant by a beneficiary under a settlement to indemnify the grantor from liability in respect of mortgages of the settled property may be a sufficient consideration (*q*). So, also, is the loan of a sum of money trifling in comparison with the value of the property conveyed (*r*).

Liability incurred by grantee.

Examples.

A settlement made by a husband and wife of property in which they both have interests of some kind—as, for instance, when a husband has an interest in right of his wife (*s*), or the wife an equity to a settlement of property taken by the husband (*t*)—is regarded as the outcome of a bargain and therefore not as a voluntary conveyance. Where, however, property stands settled upon a married woman to her separate use, so that her husband's sole interest therein is the expectancy of a tenancy by the curtesy in the event of her dying intestate during his life and without having previously parted with the property, a resettlement by the husband and wife conferring a greater interest upon the husband is a voluntary conveyance (*u*).

Settlements by husband and wife.

Where the grantee under a conveyance, otherwise voluntary, covenants to carry out some improvement on the estate conveyed, and the

Other instances of sufficient consideration.

(*m*) *Bayspoole* v. *Collins* (1871), 6 Ch. App. 228.

(*n*) *Price* v. *Jenkins* (1877), 5 Ch. D. 619, C. A.; *Re Doble, Ex parte Doble* (1878), 26 W. R. 407; *Re Lulham, Brinton* v. *Lulham* (1884), 32 W. R. 1013; *Harris* v. *Tubb* (1889), 42 Ch. D. 79. In *Lee* v. *Mathews* (1880), 6 L. R. Ir. 530, C. A., the Court of Appeal in Ireland dissented from the principle laid down in *Price* v. *Jenkins*, *supra*, that a settlement of leaseholds must necessarily be one for value, and held that in each case the court has to inquire whether the transaction is one of bargain involving mutual considerations, or a gift involving merely bounty from one party to the other; and see *Gardiner* v. *Gardiner* (1861), 12 I. C. L. R. 565. The principle of *Price* v. *Jenkins*, *supra*, has been confined strictly to cases under the stat. (1584-5) 27 Eliz. c. 4, the courts refusing to extend it to cases under the stat. (1571) 13 Eliz. c. 5; see *Re Ridler, Ridler* v. *Ridler* (1882), 22 Ch. D. 74, C. A.; *Re Pumfrey, Ex parte Hillman* (1879), 10 Ch. D. 622, C. A.; and p. 81, *ante*.

(*o*) *Shurmur* v. *Sedgwick, Crossfield* v. *Shurmur* (1883), 24 Ch. D. 597.

(*p*) *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A., *per* BOWEN, L.J., at p. 25.

(*q*) *Townend* v. *Toker* (1866), 1 Ch. App. 446; compare *Persse* v. *Persse* (1840), 7 Cl. & Fin. 279, 317, 318, H. L., where part of the consideration was a liability incurred which was afterwards discharged.

(*r*) *Bayspoole* v. *Collins*, *supra*.

(*s*) *Hewison* v. *Negus* (1853), 16 Beav. 594; *Teasdale* v. *Braithwaite* (1876), 4 Ch. D. 85, 90; affirmed (1877), 5 Ch. D. 630, C. A.; *Re Foster and Lister* (1877), 6 Ch. D. 87; see also *Schreiber* v. *Dinkel* (1886), 54 L. T. 911, C. A.

(*t*) *Re Home, Ex parte Home* (1885), 54 L. T. 301; and see *Ashe* v. *Lowe* (1833), Hayes & Jo. 287; for cases as to resettlements, see *Doe* d. *Baverstock* v. *Rolfe* (1838), 8 Ad. & El. 650; *Tarleton* v. *Liddell* (1851), 17 Q. B. 390.

(*u*) *Shurmur* v. *Sedgwick, Crossfield* v. *Shurmur, supra*.

SECT. 2. Fraudulent Intent and Proof thereof.

covenant is of such a nature that a breach thereof would not entitle the grantor to damages, and there is no provision for the avoidance of the grant on the grantee's failure to perform the covenant, the covenant does not constitute a sufficient consideration to take the conveyance out of the operation of the statute (*a*); but the surrender of a claim to an interest in an estate, although discovered subsequently to have been unfounded, is sufficient consideration for a settlement of the estate by which an interest is limited to the claimant (*b*). The surrender of a prior voluntary bond is valuable consideration for a second bond given to the obligee of the first (*c*); and a grant to secure money already due, if made in pursuance of an agreement by the grantee to give time for the repayment of the debt, or if it is made in circumstances from which an implied request for forbearance for a time can be inferred and forbearance is in fact given, is one for valuable consideration (*d*). If, however, further security is given by the grantor without communication with the grantee, the grant is purely voluntary (*e*).

Effect of subsequent events.

A subsequent failure of what was at the date of the conveyance a good consideration will not cause avoidance (*f*); and a conveyance voluntary in its inception may become valid by force of subsequent events (*g*), but not as against a purchaser for value from the grantor before those events (*h*).

Proof of consideration.

It is not necessary that the consideration should appear on the face of the instrument, as consideration, so long as it is not inconsistent with the terms of the instrument, may be proved by parol evidence (*i*).

SECT. 3.—*Purchasers who may impeach.*

Subsequent purchasers.

197. To obtain the benefit of the statute 27 Eliz. c. 4 a purchaser must give valuable consideration (*k*), and the transaction as between

(*a*) *Rosher* v. *Williams* (1875), L. R. 20 Eq. 210.

(*b*) *Heap* v. *Tonge* (1851), 9 Hare, 90.

(*c*) *Ex parte Berry* (1812), 19 Ves. 218; and see *Gilham* v. *Locke* (1804), 9 Ves. 612.

(*d*) *Stiles* v. *A.-G.* (1794), 2 Atk. 152; *Alliance Bank* v. *Broom* (1864), 2 Drew. & Sm. 289; *Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309, *per* Lord MACNAGHTEN, at p. 313.

(*e*) *Re Barker's Estate, Jones* v. *Bygott, Bygott* v. *Hellard* (1875), 44 L. J. (CH.) 487; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A.; and see *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291; and compare p. 82, *ante*. For other examples of cases in which there was held to have been sufficient consideration to make stat. (1584-5) 27 Eliz. c. 4 not applicable, see *Carter* v. *Hind* (1853), 2 W. R. 27; *Atkinson* v. *Smith* (1858), 28 L. J. (CH.) 2; *Ward* v. *Shallet* (1750), 2 Ves. Sen. 16; *Wakefield* v. *Gibbon* (1857), 1 Giff. 401. As to what persons will be within the consideration of marriage, see *De Mestre* v. *West*, [1891] A. C. 264, P. C.

(*f*) *Paget* v. *Paget* (1882), 9 L. R. Ir. 128.

(*g*) *Prodgers* v. *Langham* (1663), 1 Sid. 133; *Clarke* v. *Willott* (1872), L. R. 7 Exch. 313, 317. See, further, p. 101, *post*.

(*h*) *O'Donovan* v. *Rogers* (1858), 7 I. Ch. R. 496, C. A.

(*i*) *Gale* v. *Williamson* (1841), 8 M. & W. 405; *Pott* v. *Todhunter* (1845), 2 Coll. 76; *Leifchild's Case* (1865), L. R. 1 Eq. 231; *Townend* v. *Toker* (1866), 1 Ch. App. 446, 459; *Bayspoole* v. *Collins* (1871), 6 Ch. App. 228, 233; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, 388, C. A. See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 446.

(*k*) Stat. (1584-5) 27 Eliz. c. 4 uses the words "for money or other good

SECT. 3. Purchasers who may impeach.

him and his vendor must be *bonâ fide* and not a mere colourable contrivance to set aside a former voluntary grant, as, for instance, a purchase of the lands at a tenth of the true value (*l*).

Form of subsequent purchases.

It is immaterial what form the subsequent purchase takes. Lessees are expressly mentioned in the statute (*m*); and mortgagees, whether legal (*n*) or equitable (*o*), and beneficiaries under a marriage settlement (*p*), have the same rights as purchasers in the commercial meaning of the word. A subsequent judgment creditor of the grantor is not, however, a subsequent purchaser, nor was he so even when under the provisions of the Judgments Act, 1838 (*q*), a judgment operated as an immediate charge on lands (*r*); nor is a husband who married under the law prior to the Married Women's Property Acts (*s*), and so acquired an estate in his wife's lands (*t*).

Purchaser from persons other than the original grantor.

198. A prior conveyance made with an actual fraudulent intent, or fraudulently kept on foot, is void as against a subsequent purchaser, whether from the grantor of the prior conveyance or from a person deriving title through him (*a*). If, however, the prior conveyance is deemed fraudulent merely because voluntary, a subsequent purchaser who purchased before 1893 can take the benefit of the statute 27 Eliz. c. 4 only if he purchases from the prior

consideration," but "good consideration" in this passage means valuable consideration; see *Newstead* v. *Searles* (1737), 1 Atk. 265, 267; *Doe* d. *Otley* v. *Manning* (1807), 9 East, 59, 69; see also note (*k*), p. 81, *ante*; see, *contra*, *Banbury's* (*Lord*) *Case* (1676), Freem. (CH.) 8. A prior voluntary conveyance cannot be affected by a subsequent voluntary conveyance (see p. 100, *post*), and where the prior conveyance was made with an actual fraudulent intent it cannot be avoided by a volunteer (*Upton* v. *Basset* (1595), Cro. Eliz. 445; Shep. Touch. 65).

(*l*) *Upton* v. *Basset*, *supra*; *Doe* d. *Watson* v. *Routledge* (1777), 2 Cowp. 705, 712; *Doe* d. *Parry* v. *James* (1812), 16 East, 212; *Metcalfe* v. *Pulvertoft* (1813), 1 Ves. & B. 180; and see *Roberts* v. *Williams* (1844), 4 Hare, 129. A purchaser who has in this manner attempted to defeat a prior voluntary conveyance will not be entitled to a charge on the lands purported to have been conveyed to him for the inadequate consideration he has paid; see *Doe* d. *Watson* v. *Routledge*, *supra*.

(*m*) Stat. (1584-5) 27 Eliz. c. 4, s. 1; and see *Cross* v. *Faustenditch* (1607), Cro. Jac. 180; *Goodright* d. *Humphreys* v. *Moses* (1775), 2 Wm. Bl. 1019; see also *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21, 22; *Moore* v. *Crofton* (1845), 3 Jo. & Lat. 438.

(*n*) *Doe* d. *Richards* v. *Lewis* (1852), 11 C. B. 1035; *Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A. An admission by the grantor as to the advance of money is not sufficient evidence to avoid a prior settlement (*Doe* d. *Sweetland* v. *Webber* (1834), 1 Ad. & El. 733).

(*o*) *Lister* v. *Turner* (1846), 5 Hare, 281; and see *Buckle* v. *Mitchell* (1812), 18 Ves. 100.

(*p*) *Doe* d. *Watson* v. *Routledge*, *supra*.

(*q*) 1 & 2 Vict. c. 110, s. 13; see titles EXECUTION, Vol. XIV., p. 70; JUDGMENTS AND ORDERS.

(*r*) *Evans* v. *Evans* (1852), 2 I. Ch. R. 242; *Beavan* v. *Oxford* (*Earl*) (1856), 6 De G. M. & G. 507; *Benham* v. *Keane* (1861), 31 L. J. (CH.) 129, 132, C. A.; *Dolphin* v. *Aylward*, *supra*; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, P. C.

(*s*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 8; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1. As to judgments operating as a charge on lands, see titles EXECUTION, Vol. XIV., p. 70; JUDGMENTS AND ORDERS.

(*t*) *Doe* d. *Richards* v. *Lewis*, *supra*.

(*a*) *Burrel's Case* (1607), 6 Co. Rep. 72 a; and see *Lewis* v. *Rees* (1856), 3 K. & J. 132, 141; Sugden, Vendors and Purchasers, 14th ed., 713.

SECT. 3. Purchasers who may impeach.

grantor himself. In any other case the presumption of a fraudulent intent does not arise, as the acts of the subsequent grantor cannot be evidence of the intent of the prior grantor (*b*). A voluntary grantee is, therefore, secure against a purchaser from the heir (*c*), devisee (*d*), or subsequent voluntary grantee (*e*) of his grantor.

Change in status of grantor.

A change in the status of the grantor between the date of the voluntary grant and that of the subsequent purchase will not prevent the presumption being raised, as, for instance, when a married woman made a voluntary settlement during coverture and sold the same property after her husband's death (*f*).

Devolution of power to avoid.

A general power of attorney to sell the lands of the grantor not expressly extending to the lands comprised in a prior voluntary settlement did not authorise the attorney to defeat such a settlement by a subsequent sale (*g*); and a prior voluntary conveyance is good as against a trustee of a creditor's trust deed to whom the voluntary grantor covenanted to convey all his real estate (*h*). A trustee in bankruptcy had the same powers as the bankrupt would have had to defeat a prior voluntary conveyance, although such a conveyance is not void under either the Bankruptcy Acts (*i*), or under the statute 13 Eliz. c. 5 (*k*); but this power could only be exercised with the permission of the court (*l*).

Notice of prior grant.

199. It is immaterial whether the subsequent purchaser had or had not notice of the prior voluntary conveyance before the completion of his purchase, or whether the interest he purchased was legal or equitable (*m*), for the prior voluntary conveyance is void as against him under the statute, and not by any rule of equity (*n*); and so far has this principle been carried, that even where the subsequent

(*b*) *Doe* d. *Newman* v. *Rusham* (1852), 17 Q. B. 723, 724; and see *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, 504. It is for this reason that the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), s. 3, refers to subsequent dispositions by the author of the voluntary conveyance. As to the presumption of fraudulent intent, see pp. 92, 94, 95, *ante*.

(*c*) *Parker* v. *Carter* (1844), 4 Hare, 400, 410; *Lewis* v. *Rees* (1856), 3 K. & J. 132, 141, 151.

(*d*) *Doe* d. *Newman* v. *Rusham*, *supra*.

(*e*) *Newport's* (*Andrew*) *Case* (1694), Skin. 423; *Burg's* (*Lady*) *Case* (1600), Moore (K. B.), 602; *Ashley* v. *Ashley* (1829), 3 Sim. 149; *Doe* d. *Newman* v. *Rusham*, *supra*, at p. 733, overruling *Jones* d. *Moffett* v. *Whittaker* (1841), Long. & T. 141; and see *Prodgers* v. *Langham* (1663), 1 Sid. 133; *George* v. *Milbanke* (1803), 9 Ves. 190, 193; *Parr* v. *Eliason* (1800), 1 East, 92, 95; *Johnson* v. *Leyard* (1822), Turn. & R. 281, 294; *Clarke* v. *Willott* (1872), L. R. 7 Exch. 313. See, *contra*, *Doe* d. *Bothell* v. *Martyr* (1805), 1 Bos. & P. (N. R.) 332; *Re M'Donagh's Estate* (1879), 3 L. R. Ir. 408.

(*f*) *Goodright* d. *Humphreys* v. *Moses* (1775), 2 Wm. Bl. 1019.

(*g*) *General Meat Supply Association, Ltd.* v. *Bouffler* (1879), 40 L. T. 126.

(*h*) *Cadell* v. *Bewley* (1867), 16 L. T. 141; but see *Barton* v. *Vanheythuysen*, *Stone* v. *Vanheythuysen* (1853), 11 Hare, 126; *Butterfield* v. *Heath* (1852), 15 Beav. 408.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275—279.

(*k*) See pp. 78 *et seq.*, *ante*.

(*l*) *Re Cross* (1870), 19 W. R. 153.

(*m*) *Buckle* v. *Mitchell* (1812), 18 Ves. 100, 110.

(*n*) *Gooch's Case* (1590), 5 Co. Rep. 60 a, b; *Chapman* d. *Staverton* v. *Emery* (1775), 1 Cowp. 278, 280.

SECT. 3. Purchasers who may impeach.

purchaser was himself a trustee of the prior voluntary conveyance his purchase gave him a good title (*o*).

SECT. 4.—*Grantees under Conveyances Voidable merely as being Voluntary.*

Rights as against grantor and others.

200. A conveyance coming within the mischief of the statute 27 Eliz. c. 4 merely because voluntary is, between grantor and grantee, valid and binding (*p*). It is also good as against volunteers claiming under a subsequent grant from the same grantor (*q*), as against purchasers for value from such subsequent voluntary grantees (*r*), and as against grantees under a prior grant which is voidable in equity as being obtained by fraud (*s*).

The voluntary conveyance could be avoided only by a subsequent grant for value (*t*), and then to the extent of the interest thereby created, and not further (*a*).

(*o*) *Doe* d. *Tunstill* v. *Bottriell* (1833), 5 B. & Ad. 131; and see *Currie* v. *Nind* (1836), 1 My. & Cr. 17.

(*p*) *Pulvertoft* v. *Pulvertoft* (1811), 18 Ves. 84; *Smith* v. *Garland* (1817), 2 Mer. 123, *per* Sir WILLIAM GRANT, at p. 127; *Clarke* v. *Willott* (1872), L. R. 7 Exch. 313; *Paul* v. *Paul* (1882), 20 Ch. D. 742, C. A.; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, P. C.; *Mallott* v. *Wilson*, [1903] 2 Ch. 494, 504.

(*q*) *Clavering* v. *Clavering* (1705), 2 Vern. 473; *Doe* d. *Newman* v. *Rusham* (1852), 17 Q. B. 723; *Scott* v. *Scott* (1854), 4 H. L. Cas. 1065; and see *Mallott* v. *Wilson*, *supra*.

(*r*) See cases cited in note (*e*), p. 99, *ante*.

(*s*) *Dickinson* v. *Burrell*, *Dickinson* (*Ann*) v. *Burrell*, *Stourton* v. *Burrell* (1866), L. R. 1 Eq. 337. The court will set such a voidable conveyance aside at the suit of volunteers, even where the grantor refuses to join in the action.

(*t*) *Re Walhampton Estate* (1884), 26 Ch. D. 391. The grantor could not of himself make a good title to the subsequent purchaser, and therefore the courts refused to grant him specific performance of the contract for sale unless the purchaser had actually accepted his title, and they also allowed the purchaser to recover back the deposit paid on the contract being executed; see *Smith* v. *Garland*, *supra*; *Johnson* v. *Legard* (1822), Turn. & R. 281; *Butterfield* v. *Heath* (1852), 15 Beav. 408; *De Hoghton* v. *Money* (1866), 2 Ch. App. 164; *Peter* v. *Nicolls* (1871), L. R. 11 Eq. 391; *Rosher* v. *Williams* (1875), L. R. 20 Eq. 210; *Re Briggs and Spicer*, [1891] 2 Ch. 127, 134.

(*a*) *Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486, *per* Lord HATHERLEY, L.C., at pp. 499, 500: "On behalf of a mortgagee or purchaser the statute intervenes and says that as to any purchaser the deed shall be invalidated to the extent of the interest of that purchaser. It leaves all those who were interested under the voluntary settlement in exactly the same position in which they were originally placed when the settlement was executed, except that they are displaced to the extent to which the mortgage displaces them"; and see *Re Walhampton Estate*, *supra*, at p. 393.

When a voluntary conveyance was avoided by a subsequent sale the voluntary grantees had no claim to the purchase-money: their remedy, if any, was to sue on the covenants for title contained in their deed (*Williamson* v. *Codrington* (1750), 1 Ves. Sen. 511, 515, 516; *Evelyn* v. *Templar* (1787), 2 Bro. C. C. 148; *Pulvertoft* v. *Pulvertoft*, *supra*; *Daking* v. *Whimper* (1859), 26 Beav. 568; *Townend* v. *Toker* (1866), 1 Ch. App. 446; see, *contra*, *Leach* v. *Dene* (1640), reported in a note to *Townend* v. *Toker*, *supra*, at p. 461). Where an equity of redemption was settled, a sale by the mortgagee did not defeat the rights under the settlement in the surplus proceeds of sale (*Re Walhampton Estate*, *supra*). If, however, the grantor was himself a trustee, or in the position of a trustee, of the voluntary conveyance, at the time of the subsequent sale, he was accountable on the ground that the sale was a breach of trust (*Harding* v. *Howell* (1889), 14 App. Cas. 307, 317, P. C. Contrast *Doe* d. *Tunstill* v. *Bottriell*, *supra*, where the subsequent purchaser was a trustee of the voluntary

SECT. 4. Grantees under Conveyances etc.

In case of subsequent mortgage.

201. When the subsequent conveyance for valuable consideration is a mortgage, the voluntary grantees are entitled to redeem it (*b*). If in the case of a subsequent mortgage the mortgage debt is secured partly on the property comprised in the voluntary conveyance, and partly on other property of the grantor, the mortgagee can have recourse for payment of his debt to the property voluntarily conveyed only when the other property has been exhausted (*c*); and where a grantor has died after having mortgaged certain property comprised in his previous voluntary conveyance, the sum secured by the mortgage is to be paid out of the estate of the grantor in exoneration of the property voluntarily conveyed (*d*). On the other hand, voluntary grantees cannot be affected injuriously by an application of the doctrine of marshalling as between subsequent mortgagees whose securities comprise other property besides the property voluntarily conveyed (*e*); nor can a subsequent mortgagee consolidate a mortgage on property not subject to the voluntary conveyance with a mortgage on property so subject (*f*).

Consideration given subsequently.

202. A voluntary grantee might have acquired an indefeasible title either by the death of his grantor (*g*), or by subsequently giving valuable consideration (*h*). So, even before 1893, *bonâ fide* purchasers for value from a voluntary grantee, whether taking a legal or an equitable title, and whether with or without notice of the nature of the grant to their grantor, had priority over subsequent purchasers for value from the original grantor (*i*).

SECT. 5.—*Effect of Reservation of a Power of Revocation.*

27 Eliz. c. 4, s. 4.

203. Any conveyance of lands or other hereditaments, whether voluntary or for valuable consideration (*k*), in which a power of

conveyance). The voluntary grantee was also entitled to be reimbursed out of the purchase-money all sums expended by him upon improvements (*Stepney* v. *Biddulph* (1865), 13 W. R. 576; and see *Ex parte Bennett* (1805), 10 Ves. 381, 400; and *Trevelyan* v. *White* (1839), 1 Beav. 588, 592).

(*b*) *Rand* v. *Cartwright* (1664), 1 Cas. in Ch. 59; and see *Thorne* v. *Thorne* (1683), 1 Vern. 182; *Howard* v. *Harris* (1683), 1 Vern. 190.

(*c*) *Hales* v. *Cox* (1863), 32 Beav. 118; *Anstey* v. *Newman* (1870), 39 L. J. (CH.) 769; *Mallott* v. *Wilson*, [1903] 2 Ch. 494, 505; and see *Re Walhampton Estate* (1884), 26 Ch. D. 391.

(*d*) *Mallott* v. *Wilson, supra*.

(*e*) *Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486, *per* Lord HATHERLEY, L.C., at p. 501; and see *Aldrich* v. *Cooper* (1803), 8 Ves. 382.

(*f*) *Re Walhampton Estate, supra*.

(*g*) See p. 99, *ante*.

(*h*) *Prodgers* v. *Langham* (1663), 1 Sid. 133; and see *George* v. *Milbanke* (1803), 9 Ves. 190; *Parr* v. *Eliason* (1800), 1 East, 92; *Johnson* v. *Legard* (1822), Turn. & R. 281, 294; *Clarke* v. *Willott* (1872), L. R. 7 Exch. 313; *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31, 37; *Re Briggs and Spicer*, [1891] 2 Ch. 127, 134.

(*i*) Stat. (1584-5) 27 Eliz. c. 4, s. 3 (s. 4 in statutes at large); this section is very similar to the proviso contained in stat. (1571) 13 Eliz. c. 5, s. 5, in favour of *bonâ fide* purchasers without notice; see pp. 78, 81, *ante*; *Prodgers* v. *Langham, supra*; *Doe* d. *Newman* v. *Rusham* (1852), 17 Q. B. 723; *secus*, where the purchaser from the original grantor is prior in date (*O'Donovan* v. *Rogers* (1858), 7 I. Ch. R. 1, 496; and see *Re Brall, Ex parte Norton*, [1893] 2 Q. B. 381, 383, 385).

(*k*) *Re St. Saviour's, Southwark* (1606), Lane, 21, 22.

SECT. 5.

Effect of Reservation of a Power of Revocation.

revocation exercisable at the will of the grantor is reserved, is void as against subsequent purchasers for valuable consideration of the same lands or hereditaments although the power of revocation is not exercised (*l*).

What constitutes a power of revocation.

The following powers are powers of revocation within the last-mentioned provision:—A power to charge the lands conveyed up to the full extent of their value (*m*); a power to lease the lands conveyed for a long term of years with or without a rent (*n*); a power of revocation exercisable with the consent of some person under the influence of the grantor (*o*); and a power of revocation exercisable on the payment of a nominal sum (*p*). On the other hand, a power to charge the lands conveyed with a particular sum less than the value of the property conveyed (*a*); a power of revocation exercisable only with the consent of independent persons, such as trustees of the settlement created by the conveyance (*b*); and a power of revocation exercisable only on the giving of a substantial consideration (*c*), do not bring the grant within the rule.

Power exercisable from future date.

Where a power of revocation exercisable at will, but at a future date, is reserved, the conveyance is void as against a subsequent purchaser only as from that date, and not from the date of the conveyance to him (*d*).

The title of a subsequent purchaser is not affected by the fact that the power of revocation has been released before the date of his purchase (*e*).

(*l*) Stat. (1584-5) 27 Eliz. c. 4, s. 4 (s. 5 in statutes at large). Lord St. Leonards, in Sugden on Powers, 8th ed., p. 565, expresses the opinion that s. 4 of the statute does not operate to aid a defective execution of a power of revocation in favour of a purchaser, but gives him a title in opposition to the conveyance reserving the power; so that where the power of revocation is purported to be exercised in favour of a purchaser, but is informally exercised, the purchaser does not get a good title unless the lands are actually conveyed by the instrument purporting to exercise the power. The Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21) (see p. 93, *ante*), would seem not to apply to a voluntary conveyance reserving a power of revocation.

(*m*) *Tarback* v. *Marbury* (1705), 2 Vern. 510 (decided under stat. (1571) 13 Eliz. c. 5).

(*n*) *Lavender* v. *Blackston* (1675), 3 Keb. 526.

(*o*) *Lavender* v. *Blackston, supra;* and see *Standen* v. *Bullock* (1600), referred to in the judgment in *Twyne's Case* (1602), 3 Co. Rep. 80 b, 82 b.

(*p*) *Griffin* v. *Stanhope* (1617), Cro. Jac. 454.

(*a*) *Jenkins* v. *Keymis* (1664), 1 Lev. 150.

(*b*) *Banbury's (Lord) Case* (1676), Freem. (CH.) 8; *Buller* v. *Waterhouse* (1677), T. Jo. 94; and see *Re Lane-Fox, Ex parte Gimblett*, [1900] 2 Q. B. 508.

(*c*) *Re St. Saviour's, Southwark* (1606), Lane, 21; *Banbury's (Lord) Case, supra.*

(*d*) *Standen* v. *Bullock, supra;* see also *Bullock* v. *Thorne* (1600), Moore (K. B.), 615, 618. A power of revocation by will would seem to be within this principle; see Chance, Treatise on Powers, Vol. II., s. 1893.

(*e*) *Bullock* v. *Thorne, supra.* Lord St. Leonards, however, doubts whether this authority applies where both the conveyance reserving the power of revocation and the deed releasing the power are made for valuable consideration; see Sugden on Powers, 8th ed., p. 645; Sugden, Vendors and Purchasers, 14th ed., p. 722. As to powers, generally, see title POWERS.

Part III.—Conveyances Impeachable from Position of Parties.

SECT. 1.—*Presumed Undue Influence* (*f*).

SUB-SECT 1.—*In General.*

SECT. 1. Presumed Undue Influence.

Undue influence presumed from confidential relationship.

204. It is a general principle of equity that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them (*g*). In cases where a confidential relation is shown to exist, the court is concerned to see that the grantor was in a position to form an entirely free and unfettered judgment, independent of any sort of control (*h*). The party seeking relief has not to prove that actual fraud or coercion (*i*), or even direct persuasion (*j*), was employed; he has but to prove the existence of the confidential relation, and then the onus falls upon the party seeking to uphold the conveyance of proving that the power conferred by the relation was not abused (*k*). To discharge that onus it must be shown not merely that the grantor was aware of the effect of his action, but that he had independent advice, and at the time of making the grant was removed from the influence of the party in whose interest the grant was made (*l*). When once the confidential relation is proved the age and capacity of the grantor are considerations of little, if any, importance (*m*), and the onus of proof of the discontinuance of the relation will be upon the grantee (*n*).

Burden of proof.

(*f*) As to undue influence in cases where no relation exists from which it would be presumed, see title MISREPRESENTATION AND FRAUD. As to equitable relief in cases of fiduciary relation, generally, see title EQUITY, Vol. XIII., p. 154.

(*g*) *Rhodes* v. *Bate* (1866), 1 Ch. App. 252, 257; see also *Hatch* v. *Hatch* (1804), 9 Ves. 292; *Morley* v. *Loughnan*, [1893] 1 Ch. 736, 752; *Powell* v. *Powell*, [1900] 1 Ch. 243.

(*h*) *Archer* v. *Hudson* (1844), 7 Beav. 551.

(*i*) *Gibson* v. *Jeyes* (1801), 6 Ves. 266, 278; *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, 771; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A., *per* LINDLEY, L.J., at p. 182.

(*j*) *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 52.

(*k*) *Allcard* v. *Skinner*, *supra*, *per* LINDLEY, L.J., at p. 183.

(*l*) *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Allcard* v. *Skinner*, *supra*; see also *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Turner* v. *Collins* (1871), 7 Ch. App. 329, *per* Lord HATHERLEY, L.C., at p. 338. In *Huguenin* v. *Baseley*, *supra*, Lord ELDON, at p. 300, said: "The question is not whether she (the grantor) knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed around her, as against those who advised her, which from their situation and relation in respect to her, they were bound to exert on her behalf." For form of acknowledgment by settlor that he understands the effect of a voluntary settlement, see Encyclopædia of Forms and Precedents, Vol. I., p. 223.

(*m*) *Rhodes* v. *Bate*, *supra*, *per* TURNER, L.J., at p. 257.

(*n*) *Rhodes* v. *Bate*, *supra*.

SECT. 1. **Presumed Undue Influence.**

This principle applies both to voluntary conveyances and to conveyances for valuable consideration (*o*), except that in the case of the latter, where the transaction is manifestly fair, evidence of independent advice is not necessary (*p*).

Independent advice.

205. It is not sufficient that the grantor should be proved to have had an independent adviser unless it is also proved that he acted upon the advice given (*q*). The grantee's solicitor is not an independent adviser (*r*). The independent adviser must be one who is fully cognizant of all circumstances material to the case; and it is his duty not merely to satisfy himself that the grantor understands the effect of and wishes to make the grant, but to protect the grantor from himself as well as from the influence of the grantee (*r*). A solicitor who is called upon to advise the grantor must satisfy himself that the grant is one that is right and proper in all the circumstances of the case, and if he cannot so satisfy himself he should advise his client not to proceed, and refuse to act further for him in the matter (*r*).

Limitations to principle.

206. The general principle above enunciated is, however, subject to the following limitations:—

First, it is applicable only to conveyances *inter vivos*, and does not extend to testamentary dispositions (*s*).

Gifts by will.

To set aside a gift contained in a will the party seeking relief, at least where the will was not prepared by nor on the instructions of a substantial beneficiary, nor in such circumstances as to arouse the suspicions of the court that the testator neither knew nor approved the effect of his dispositions (*t*), must prove affirmatively that an influence amounting to force or coercion was employed (*u*).

Trifling gifts.

Secondly, the court will not lend its aid to set aside gifts of a trifling amount (*a*), or gifts made by a grantor of so ample a fortune that they must be trifling to him (*b*), unless proof be given of undue influence having in fact been exercised.

Benefits given to third parties.

207. The conveyance is set aside not merely as against the party who exercised, or is presumed to have exercised, undue influence, but also as against third parties, who are volunteers and who

(*o*) *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 50.

(*p*) *Wright* v. *Carter*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 55.

(*q*) *Powell* v. *Powell*, [1900] 1 Ch. 243, *per* FARWELL, J., at p. 246; *Wright* v. *Carter*, *supra*; see *Moxon* v. *Payne* (1873), 8 Ch. App. 881.

(*r*) *Powell* v. *Powell*, *supra*.

(*s*) As to the construction of testamentary dispositions, generally, see title WILLS; as to the grounds upon which probate may be opposed, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 179.

(*t*) *Tyrrell* v. *Painton*, [1894] P. 151, C. A.; *Donnelly* v. *Broughton*, [1891] A. C. 435.

(*u*) *Parfitt* v. *Lawless* (1872), 41 L. J. (P. & M.) 68; *Boyse* v. *Rossborough* (1857), 6 H. L. Cas. 2, *per* Lord CRANWORTH, L.C., at p. 49.

(*a*) *Rhodes* v. *Bate* (1866), 1 Ch. App. 252, *per* TURNER, L.J., at p. 258; *Ailcard* v. *Skinner* (1887), 36 Ch. D. 145, 185, C. A.

(*b*) *Wright* v. *Carter*, *supra*.

obtained benefits under the grant through such undue influence, whether privy or not (*c*) to its exercise, and as against third parties, who obtained such benefits with notice of the exercise of the influence, although they gave valuable consideration (*d*). Where, however, such benefits were not in any way derived through the undue influence, the conveyance, although ordered to be set aside so far as the party who exercised the influence is concerned, will be supported in favour of the third parties (*e*). But if the conveyance was a matter of bargaining, and all the grantees were parties to the bargain, as in the case of a grant in consideration of the grantees jointly covenanting to pay an annuity, and if it must fail as against one grantee owing to his exercise of undue influence, whether actual or presumed, it must also fail as regards the others (*f*).

Grants to third parties for benefit of person standing in confidential relation to grantor.

208. Where a conveyance is made to a third party for the benefit of a person standing in a confidential relation to the grantor, as where a child charges his property as security for a debt of his parent, undue influence is presumed (*g*). In such a case the transaction stands on the same footing as if there had been a voluntary grant to the person exercising the influence, followed by a sale by the latter to the grantee (*h*). In order to support the conveyance the grantee must, therefore, prove that he gave valuable consideration, and had no notice of the equity of the grantor to impeach the grant, or of the circumstances from which the court infers such equity (*i*). If he cannot do this it will be incumbent on him to prove affirmatively that the grantor made the conveyance voluntarily and deliberately, with knowledge of its nature and effect (*k*). A creditor who has notice that his debtor stands in such a relation to the party who offers to give security for the debt must see that the latter has legal advice (*l*), and it is desirable

(*c*) *Bridgman* v. *Green* (1755), 2 Ves. Sen. 627; *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Barron* v. *Willis*, [1900] 2 Ch. 121, C. A.; *Morley* v. *Loughnan*, [1893] 1 Ch. 736, 757; and see *Scholefield* v. *Templer* (1859), John. 155.

(*d*) *Maitland* v. *Irving* (1846), 15 Sim. 437; *Cobbett* v. *Brock* (1855), 20 Beav. 524; *Bainbrigge* v. *Browne* (1881), 18 Ch. D. 188; *De Witte* v. *Addison* (1899), 80 L. T. 207, C. A.

(*e*) *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 54, and *per* STIRLING, L.J., at p. 59; and see *Bentley* v. *Mackay* (1862), 31 Beav. 143.

(*f*) *Wright* v. *Carter*, *supra*.

(*g*) *Archer* v. *Hudson* (1844), 7 Beav. 551; *Maitland* v. *Irving*, *supra*; *Cobbett* v. *Brock* (1855), 20 Beav. 524; *Sercombe* v. *Sanders* (1865), 34 Beav. 382; *Bainbrigge* v. *Browne*, *supra*; *De Witte* v. *Addison*, *supra*; *O'Connor v. Foley*, [1905] 1 I. R. 1; *M'Mackin* v. *Hibernian Bank*, [1905] 1 I. R. 296; and see *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, P. C.

(*h*) *Cobbett* v. *Brock*, *supra*, at p. 530; see also *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188; but as to this case see note (*u*), p. 110, *post*.

(*i*) *Bainbrigge* v. *Browne*, *supra*; and see p. 107, *post*.

(*k*) *Maitland* v. *Backhouse* (1847), 16 Sim. 58; *Espey* v. *Lake* (1852), 10 Hare, 260; *Baker* v. *Bradley* (1854), 2 Sm. & G. 531; *Berdoe* v. *Dawson* (1865), 34 Beav. 603; and see *Cooke* v. *Lamotte* (1851), 15 Beav. 234, 241, 242; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, 299.

(*l*) *Cobbett* v. *Brock*, *supra*, at pp. 529, 530; and see *Bainbrigge* v. *Browne* *supra*.

SECT. 1.

Presumed Undue Influence.

that the person giving that advice should not be the solicitor of the debtor (*m*).

Where a grant is made in consideration of a money payment to a person standing in a confidential relation to the grantor, notice of the relation will not be so readily imputed to the grantee as in the case of a grant to secure a debt already due (*n*); but if the party giving security, the debtor, and creditor have all been advised by the same solicitor, the creditor will be taken to have had notice of the circumstances making the transaction voidable (*o*).

Impeachment by persons claiming through grantor.

209. The grantor's right to impeach a conveyance executed under undue influence passes, on his bankruptcy, to his trustee (*p*), and on his death to his legal personal representatives (*q*); but the representatives of the grantor cannot succeed when it is proved that the grantor, after the influence had ceased, intentionally abode by the grant (*r*), and this appears to be the case even though the grantee may not be able to prove that the grantor knew that it was impeachable (*s*).

Such a conveyance can be impeached as against the personal representatives of the grantee after his death (*t*).

Costs.

210. The allowance of costs to the parties to an action to set aside an alienation as being vitiated by undue influence, including the costs of trustees of a settlement which is set aside on that ground, is a matter for the discretion of the court (*a*). Where the trustees do not know that the settlement is voidable it is their duty to defend an action to set it aside; and where they do so, and act in a proper manner, the court will allow them their costs as between solicitor and client out of the fund comprised in the settlement (*b*). They have, however, no right of appeal from an adverse decision as to their costs, since there is, when the settlement has been set aside, no contract in existence under which they can claim costs (*c*).

(*m*) *Bainbrigge* v. *Browne*, (1881), 18 Ch. D. 188, 198; and see *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A.

(*n*) *Blackie* v. *Clarke* (1852), 15 Beav. 591, 601.

(*o*) *De Witte* v. *Addison* (1899), 80 L. T. 207, 211, C. A.

(*p*) *Ford* v. *Olden* (1867), L. R. 3 Eq. 461.

(*q*) *Holman* v. *Loynes* (1854), 4 De G. M. & G. 270; *Gresley* v. *Mousley* (1859), 4 De G. & J. 78, C. A.; *Coutts* v. *Acworth* (1869), L. R. 8 Eq. 558; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.; *Morley* v. *Loughnan*, [1893] 1 Ch. 736; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 187, C. A. For a general statement as to the rights which pass on death to the legal personal representative, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 224 *et seq.*

(*r*) *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; *Tyars* v. *Alsop* (1889), 37 W. R. 339, C. A.

(*s*) *Mitchell* v. *Homfray*, *supra*, at p. 591, C. A.

(*t*) *Phillipson* v. *Kerry* (1863), 32 Beav. 628.

(*a*) *Taylor* v. *Johnston* (1881), 19 Ch. D. 603; *Dutton* v. *Thompson* (1883), 23 Ch. D. 278, C. A.; *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157, 171, 175, 176.

(*b*) *Everitt* v. *Everitt* (1870), L. R. 10 Eq. 405; *Merry* v. *Pownall*, [1898] 1 Ch. 306; *Ideal Bedding Co., Ltd.* v. *Holland*, *supra*; and see *James* v. *Couchman* (1885), 29 Ch. D. 212, 217.

(*c*) *Dutton* v. *Thompson*, *supra*, *per* JESSEL, M.R., at p. 282.

SUB-SECT 2.—*Relations from the Existence of which Undue Influence is presumed (d).*

SECT. 1. **Presumed Undue Influence.**

211. The principle of presumed undue influence is applied in all cases where a confidential relation of any kind is shown to exist (*e*), and the following examples of confidential relations constitute an enumeration by no means exhaustive (*f*).

Application of principle.

212. There is no rule of equity that a parent or person *in loco parentis* may not accept a benefit from his child, even when that child is still under his parental influence, so long as such benefit is conferred with a deliberate and unbiassed intention. It is, however, incumbent on the parent to disprove the presumption that the parental influence tainted the gift (*g*).

Parent and child.

The parental influence against which the court seeks to protect a child is not necessarily the influence arising from fear or coercion, but includes that of kindness and affection (*h*). The fact that the child has only recently attained twenty-one years of age (*i*), or is residing with his parents (*j*), or is not conversant with business (*k*), or that the gift comprised all (*l*) or a large proportion of the property of the child (*m*), will make the presumption of undue influence the more difficult to rebut. The absence of a power of revocation in a voluntary settlement executed by a child in favour of his parent will also excite the suspicions of the court (*n*).

Resettlements of family estates and deeds of family arrangement stand upon a different footing in some respects (*o*).

(*d*) See also title CONTRACT, Vol. VII., pp. 358—360.

(*e*) See the argument of Lord ROMILLY (then Sir SAMUEL ROMILLY) in *Huguenin* v. *Baseley* (1807), 14 Ves. 273, quoted with approval by Lord COTTENHAM in *Dent* v. *Bennett* (1839), 4 My. & Cr. 269, at p. 277: "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another"; see also *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, *per* Lord CRANWORTH, at p. 771; *Cavendish* v. *Strutt* (1903), 19 T. L. R. 483; *Tate* v. *Williamson* (1866), L. R. 1 Eq. 528; *Lyon* v. *Home* (1868), L. R. 6 Eq. 655; *Morley* v. *Loughnan*, [1893] 1 Ch. 736, *per* WRIGHT, J., at p. 752.

(*f*) See also some common examples specified in title CONTRACT, Vol. VII., p. 358.

(*g*) *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; and see *Blackborn* v. *Edgley* (1720), 1 P. Wms. 600, 607; *Powell* v. *Powell*, [1900] 1 Ch. 243; *London and Westminster Loan and Discount Co., Ltd.* v. *Bilton* (1911), 27 T. L. R. 184. As to gifts in general, see title GIFTS, p. 397, *post*.

(*h*) *Turner* v. *Collins* (1871), 7 Ch. App. 329, 340.

(*i*) *Archer* v. *Hudson* (1844), 7 Beav. 551; *Baker* v. *Bradley* (1855), 7 De G. M. & G. 597, C. A., *per* TURNER, L.J., at p. 620; *Smith* v. *Kay*, *supra*; *Kempson* v. *Ashbee* (1874), 10 Ch. App. 15; *De Witte* v. *Addison* (1899), 80 L. T. 207, C. A.; *Powell* v. *Powell*, *supra*. Lord CRANWORTH, in *Smith* v. *Kay*, *supra*, at p. 772, limits the period of the continuance of parental influence to one year from the attainment of majority, but it appears impossible to lay down any definite rule on this point; see *Bainbrigge* v. *Brown* (1881), 18 Ch. D. 188, 196. As to the relation of parent and child and of guardian and ward in general, see titles HUSBAND AND WIFE; INFANTS AND CHILDREN.

(*j*) *Berdoe* v. *Dawson* (1865), 34 Beav. 603; *De Witte* v. *Addison*, *supra*.

(*k*) *Bainbrigge* v. *Browne*, *supra*.

(*l*) *Bury* v. *Oppenheim* (1859), 26 Beav. 594; *Chambers* v. *Crabbe* (1865), 34 Beav. 457.

(*m*) *Davies* v. *Davies* (1863), 4 Giff. 417.

(*n*) *Powell* v. *Powell*, *supra*.

(*o*) See title FAMILY ARRANGEMENTS, Vol. XIV., pp. 546 *et seq.*; and as to

SECT. 1. **Presumed Undue Influence.**

Persons standing *in loco parentis*.

The principles applicable in the case of a parent apply to all cases where a person standing *in loco parentis* receives a benefit from the person under his protection, as in cases of benefits conferred on an elder brother or sister (*p*), step-father (*q*), step-mother (*r*), or uncle (*s*), standing *in loco parentis*, or on a guardian or ex-guardian (*t*) or a close relative of a guardian (*a*). In such cases, where the accounts of the guardianship are not settled at the time when the benefit is conferred, the presumption of undue influence is the more difficult to rebut (*b*).

Gift by parent to child.

There is no presumption of undue influence in the case of a gift to a son, grandson, or son-in-law, although made during the donor's illness and a few days before his death (*c*).

Solicitor and client.

213. The relation of solicitor and client is one which gives rise to the presumption of undue influence. So long as that relation subsists, a solicitor cannot take a benefit from his client by way of gift *inter vivos* unless he can prove that the gift was entirely uninfluenced by the relation (*d*), and the same rule applies to gifts made by a client to a near relative of the solicitor (*e*).

Gifts.

Even where a solicitor can prove that prior to the date of the gift he had ceased to act as the donor's solicitor, it still remains for him to show that the influence arising from the relation has also ceased (*f*).

Purchases.

A purchase by a solicitor from his client will also be liable to be

resettlements, generally, see also title SETTLEMENTS. As to the exercise of powers of appointment, see title POWERS.

(*p*) *Harvey* v. *Mount* (1845), 8 Beav. 439; *Sercombe* v. *Sanders* (1865), 34 Beav. 382; *Sharp* v. *Leach* (1862), 31 Beav. 491; and see *Sturge* v. *Sturge* (1849), 12 Beav. 229.

(*q*) *Everitt* v. *Everitt* (1870), L. R. 10 Eq. 405; *Beasley* v. *Magrath* (1804), 2 Sch. & Lef. 31.

(*r*) *Powell* v. *Powell*, [1900] 1 Ch. 243.

(*s*) *Archer* v. *Hudson* (1844), 7 Beav. 551; *Dawson* v. *Massey* (1809), 1 Ball & B. 219.

(*t*) *Pierse* v. *Waring* (1745), 1 P. Wms. 120 (cited in a note to *Hamilton (Duke)* v. *Mohun* (1710), 1 P. Wms. 118); *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129; *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; *Hatch* v. *Hatch* (1804), 9 Ves. 292; *Maitland* v. *Irving* (1846), 15 Sim. 437; *Maitland* v. *Backhouse* (1847), 16 Sim. 58; *Dettmar* v. *Metropolitan and Provincial Bank* (1863), 1 Hem. & M. 641; *Griffin* v. *De Veiulle* (1781), cited in *Huguenin* v. *Baseley* (1807), 14 Ves. 273, 283 (more fully in Wooddeson, Laws of England, Vol. III., Appendix, xvi.); *O'Connor* v. *Foley*, [1905] 1 I. R. 1.

(*a*) *Aylward* v. *Kearney* (1814), 2 Ball & B. 463.

(*b*) *Hylton* v. *Hylton*, *supra*, at p. 550; *Hatch* v. *Hatch*, *supra*.

(*c*) *Beanland* v. *Bradley* (1854), 2 Sm. & G. 339.

(*d*) *Hatch* v. *Hatch*, *supra*, at p. 296; *Edwards* v. *Meyrick* (1842), 2 Hare, 60, *per* WIGRAM, V.-C., at pp. 69, 70; *Tomson* v. *Judge* (1855), 3 Drew. 306, *per* KINDERSLEY, V.-C., at p. 316; *Re Holmes' Estate*, *Woodward* v. *Humpage*, *Bevan's Case* (1861), 3 Giff. 337; *O'Brien* v. *Lewis* (1863), 11 W. R. 318; *Re Haslam and Hier-Evans*, [1902] 1 Ch. 765, C. A.; *Rhodes* v. *Bate* (1866), 1 Ch. App. 252; *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A.

(*e*) *Goddard* v. *Carlisle* (1821), 9 Price, 169; *Liles* v. *Terry*, [1895] 2 Q. B. 679, C. A.; *Willis* v. *Barron*, [1902] A. C. 271. As to relation between solicitor and client, generally, see title SOLICITORS.

(*f*) *Holman* v. *Loynes* (1854), 4 De G. M. & G. 270, 283; *Wood* v. *Downes* (1811), 18 Ves. 120; *Morgan* v. *Minett* (1877), 6 Ch. D. 638; and see *Wright* v. *Carter*, *supra*, at p. 53; and as to ratification after the relation ceased, see *Tyars* v. *Alsop* (1889), 61 L. T. 8, C. A.; and p. 113, *post*.

SECT. 1. Presumed Undue Influence.

set aside in all cases except where the transaction is manifestly fair (*g*), unless the solicitor can show, first, that the client was fully informed; secondly, that the client had competent independent advice; and thirdly, that the price which was given was a fair one (*h*), or that the bargain was as good as any that could have been obtained from any other purchaser (*i*). In determining whether the price paid was a fair one, the circumstances affecting the value of the property at the time of the purchase and known to the parties are alone taken into consideration, and the fact that the value of the property greatly increased subsequently will not vitiate the transaction (*j*). The principle extends to a purchase by a solicitor from a person who was formerly his client, where it is shown that the solicitor-purchaser was aware of a neglect of duty on the part of the vendor's new adviser, or that the solicitor-purchaser withheld or suppressed material information from such new adviser (*k*); and also to a purchase by a solicitor from the trustee in bankruptcy of his late client (*l*). The principle also applies to persons in a position analogous to that of a solicitor (*m*). The confidential position of counsel towards his client has a similar result (*n*).

Counsel and client.

214. On the same principle a gift by a *cestui que trust* to a trustee may be set aside (*o*).

Trustee and *cestui que trust*.

Unless the nature of the trusteeship is such that the fiduciary relation existing between the trustee and his *cestui que trust* could not give to the trustee any opportunity of exercising undue influence (*p*), the court will presume that where a trustee purchases from his *cestui que trust* confidence was placed in and influence exercised

(*g*) *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 54; see *Denton* v. *Donner* (1856), 23 Beav. 285; *Readdy* v. *Pendergast* (1886), 55 L. T. 767, where relief was refused.

(*h*) *Wright* v. *Carter*, *supra*, *per* STIRLING, L.J., at p. 60; see *Cane* v. *Allen* (*Lord*) (1814), 2 Dow, 289, H. L. In cases of this class it should be noted that a receipt in the body of or indorsed on the purchase deed is not sufficient to show, in favour of the solicitor supporting the conveyance, that the purchase-money was in fact paid (see *Gresley* v. *Mousley* (1862), 3 De G. F. & J. 433, C. A.).

(*i*) *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Spencer* v. *Topham* (1856), 22 Beav. 573; *Pisani* v. *A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516; *Prees* v. *Coke* (1871), 6 Ch. App. 645.

(*j*) *Montesquieu* v. *Sandys* (1811), 18 Ves. 301; *Edwards* v. *Meyrick* (1842), 2 Hare, 60.

(*k*) *Gibbs* v. *Daniel* (1862), 4 Giff. 1; see *Carter* v. *Palmer* (1842), 8 Cl. & Fin. 657, 705, H. L.

(*l*) *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500.

(*m*) *Rhodes* v. *Bate* (1866), 1 Ch. App. 252 (certified conveyancer); *Broun* v. *Kennedy* (1863), 33 Beav. 133; affirmed (1864), 4 De G. J. & Sm. 217, C. A. (counsel); *Huguenin* v. *Baseley* (1807), 14 Ves. 273 (confidential agent); *Tate* v. *Williamson* (1866), 2 Ch. App. 55 (a person appointed by relative to advise a young man).

(*n*) See title BARRISTERS, Vol. II., p. 395.

(*o*) *Hatch* v. *Hatch* (1804), 9 Ves. 292, 297; *Hunter* v. *Atkins* (1834), 3 My. & K. 113, 135; *Vaughton* v. *Noble* (1861), 30 Beav. 34, 39; *Barrett* v. *Hartley* (1866), L. R. 2 Eq. 789.

(*p*) *Sutton* v. *Jones*, *Jones* v. *Sutton* (1809), 15 Ves. 584, where the defendant was a trustee solely to preserve contingent remainders; and see *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, 771.

SECT. 1. Presumed Undue Influence.

by the former, and will avoid the transaction unless such presumption is duly rebutted (*q*).

Other confidential relations.

215. Of other relations from the existence of which the court will presume the exercise of undue influence those which have perhaps led to the avoidance of the greatest number of conveyances are those of spiritual adviser and devotee (*r*), medical attendant and patient (*s*), principal and agent (*t*), and that of a man to a woman to whom he is engaged to be married (*u*).

Husband and wife.

It is noticeable that the relation of husband and wife is not one which gives rise to the presumption that undue influence was exercised (*v*). A large gift, however, by a wife to her husband will be regarded with some degree of jealousy, and if there is any proof that the husband exercised an improper influence, the court will be inclined to set the transaction aside (*w*). Further, where creditors of the husband procure the wife's signature to a security

(*q*) *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, 779; *Denton* v. *Donner* (1856), 23 Beav. 285, 290; *Luff* v. *Lord* (1864), 34 Beav. 220, 227; *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215, 236; *Dougan* v. *Macpherson*, [1902] A. C. 197; *Plowright* v. *Lambert* (1885), 52 L. T. 646; and see *Re Dumbell, Ex parte Hughes, Ex parte Lyon* (1802), 6 Ves. 617; *Coles* v. *Trecothick* (1804), 9 Ves. 234. As to a purchase by a trustee of trust property from himself or his co-trustees, see titles EQUITY, Vol. XIII., pp. 156 *et seq.*; TRUSTS AND TRUSTEES. As to sale by mortgagor to mortgagee, see title MORTGAGE.

(*r*) *Norton* v. *Relly* (1764), 2 Eden, 286; *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Whyte* v. *Meade* (1840), 2 I. Eq. R. 420; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Lyon* v. *Home* (1868), L. R. 6 Eq. 655; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A.; *Morley* v. *Loughnan*, [1893] 1 Ch. 736; *M'Carthy* v. *M'Carthy* (1846), 9 I. Eq. R. 620; S. C., *sub nom. Fulham* v. *McCarthy* (1848), 1 H. L. Cas. 703; but see *Kirwan* v. *Cullen* (1854), 4 I. Ch. R. 322.

(*s*) *Lent* v. *Bennett* (1839), 4 My. & Cr. 269; *Pratt* v. *Barker* (1828), 4 Russ. 507; *Gibson* v. *Russell* (1843), 2 Y. & C. Ch. Cas. 104; *Ahearne* v. *Hogan* (1844), Drury *temp.* Sug. 310, 322; *Blackie* v. *Clark* (1852), 15 Beav. 595; *Billage* v. *Southee* (1852), 9 Hare, 534; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A. For an instance in which a gift by a patient to his medical adviser has, in the circumstances of the case, been upheld, see *Pratt* v. *Barker* (1826), 1 Sim. 1; affirmed (1828), 4 Russ. 507. As to the relation of doctor and patient in general, see title MEDICINE AND PHARMACY.

(*t*) *Molony* v. *Kernan* (1842), 2 Dr. & War. 31; *Rhodes* v. *Bate* (1866), 1 Ch. App. 252; *King* v. *Anderson* (1874), 8 I. R. Eq. 147, 625; see *Cane* v. *Allen* (*Lord*) (1814), 2 Dow, 289, H. L.; *Selsey* (*Lord*) v. *Rhoades* (1827), 1 Bli. (N. S.) 1, H. L.; *Re Coomber, Coomber* v. *Coomber* (1911), 103 L. T. 721, and title AGENCY, Vol. I., p. 189.

(*u*) *Page* v. *Horne* (1848), 11 Beav. 227; *Cobbett* v. *Brock* (1855), 20 Beav. 524; *Clark* v. *Girdwood* (1877), 7 Ch. D. 9, C. A.; *Lovesy* v. *Smith* (1880), 15 Ch. D. 655; *Coulson* v. *Allison* (1860), 2 De G. F. & J. 521; *James* v. *Holmes* (1862), 31 L. J. (CH.) 567.

(*v*) *Grigby* v. *Cox* (1750), 1 Ves. Sen. 517; *Field* v. *Sowle* (1827), 4 Russ. 112; *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377; *Barron* v. *Willis*, [1899] 2 Ch. 578; [1900] 2 Ch. 121, C. A.; *Howes* v. *Bishop*, [1909] 2 K. B. 390, 401, C. A.; and see *Bank of Africa, Ltd.* v. *Cohen*, [1909] 2 Ch. 129, C. A., *per* EVE, J., at p. 135; *Bank of Montreal* v. *Stuart* (1910), 103 L. T. 641, P. C. See, *contra*, *Cobbett* v. *Brock* (1855), 20 Beav. 524, 530, 531; *Parfitt* v. *Lawless* (1872), L. R. 2 P. & D. 462, 468; and *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188. The last-mentioned case appears to have been reversed in the Court of Appeal, where, however, it was not reported (see *per* Lord ALVERSTONE, C.J., in *Howes* v. *Bishop, supra*, at p. 397).

(*w*) *Grigby* v. *Cox, supra, per* Lord HARDWICKE, L.C., at p. 518; *Howes* v. *Bishop, supra, per* FARWELL, L.J., at p. 400; and see *Re Flamank, Wood* v. *Cock* (1889), 40 Ch. D. 461; *Bank of Montreal* v. *Stuart, supra.*

for his debt through the agency of the husband, they must, in order to succeed in an action on the security, be in a position to prove that a proper explanation of the effect of the document was given to the wife (*a*).

SECT. 2.—*Unconscionable Bargains.*

SUB-SECT. 1.—*In General.*

Unconscionable bargains.

216. Courts of equity have undoubted jurisdiction to grant relief against every species of fraud, including cases where it may be apparent, from the intrinsic nature and subject of the bargain itself, that it was one which no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other; in fact, an inequitable and unconscionable bargain (*b*).

The principle has now been extended to all cases in which the parties contracting do not meet on equal terms, and is not limited to expectant heirs, but applies to all persons under pressure without adequate protection, and the onus of supporting the transaction is thrown on the person benefiting (*c*). In determining whether the bargain is a hard one, the whole transaction has to be considered and not only the price (*d*).

SUB-SECT. 2.—*Expectant Heirs.*

Loans.

217. Contracts relating to the lending of money are subject to special provisions under which they may be re-opened (*e*).

Bargains with heirs.

218. The court will always relieve against the fraud which infects catching bargains with heirs, reversioners or expectants, and fraud is always presumed in such cases from the circumstances of the parties contracting—weakness on the one side, and, on the other,

(*a*) *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, P. C.; *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, C. A.; see also *Talbot* v. *Von Boris* (1910), 27 T. L. R. 95. In such cases the principle of *non est factum* (see *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704, and *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224) is more readily applied; but see *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A.; and compare *Bayot* v. *Chapman*, [1907] 2 Ch. 222, *per* SWINFEN EADY, J., at pp. 227, 228.

(*b*) *Chesterfield* (*Earl*) v. *Janssen* (1751), 2 Ves. Sen. 125, *per* Lord HARDWICKE, L.C., at p. 154. As to the sense in which the word "fraud" is used, see *Aylesford* (*Earl*) v. *Morris* (1873), 8 Ch. App. 484, *per* Lord SELBORNE, L.C., at p. 490. As to the meaning of the word "unconscionable," see *Samuel* v. *Newbold*, [1906] A. C. 461, *per* Lord LOREBURN, L.C., at p. 470. See also title EQUITY, Vol. XIII., pp. 20 *et seq.*; and as to the terms on which such a bargain will be set aside, *ibid.*, p. 21.

(*c*) *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814, 823; *Prees* v. *Coke* (1871), 6 Ch. App. 645; and see *Haygarth* v. *Wearing* (1871), L. R. 12 Eq. 320; *Evans* v. *Llewellin* (1787), 1 Cox, Eq. Cas. 333; *Murray* v. *Palmer* (1805), 2 Sch. & Lef. 474; *Wood* v. *Abrey* (1818), 3 Madd. 417; *Longmate* v. *Ledger* (1860), 2 Giff. 157; *Sturge* v. *Sturge* (1849), 12 Beav. 229; *Baker* v. *Monk* (1864), 4 De G. J. & Sm. 388; *Clark* v. *Malpas* (1862), 4 De G. F. & J. 401, C. A.; *Ford* v. *Olden* (1867), L. R. 3 Eq. 461; *James* v. *Kerr* (1889), 40 Ch. D. 449; *Fry* v. *Lane*, *Re Fry*, *Whittet* v. *Bush* (1888), 40 Ch. D. 312; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; *Slator* v. *Nolan* (1876), 11 I. R. Eq. 367; *Middleton* v. *Brown* (1878), 47 L. J. (CH.) 411, C. A.; compare *Farmer* v. *Farmer* (1848), 1 H. L. Cas. 724; *Harrison* v. *Guest* (1860), 8 H. L. Cas. 481, where relief was refused.

(*d*) *Middleton* v. *Brown*, *supra*.

(*e*) See, generally, title MONEY AND MONEY-LENDING.

SECT. 2. Unconscionable Bargains.

usury, extortion, or advantage taken of that weakness (*f*). Fraud does not mean in these cases deceit; it means an unconscionable use of the powers arising out of the attendant circumstances and conditions, and where the relative position of the parties is such as *primâ facie* to raise this presumption the transaction cannot stand, unless the person claiming the benefit thereof can prove it to be in fact fair, just, and reasonable (*g*).

Knowledge of parent.

The principle is not, it seems, applicable, at all events so strictly, where the father or other person standing *in loco parentis* to the grantor has knowledge of the transaction and does not oppose its being carried through (*h*).

Burden of proof.

The fact that the expectant heir was of full age and was well aware of the nature of the transaction is not sufficient to rebut the presumption that such a bargain is fraudulent (*i*), nor is there any obligation on an expectant heir to prove that he was in fact in financial difficulties. The onus is in all cases on the person dealing with an expectant heir to prove that the bargain is a just one (*k*).

Inadequacy of consideration.

219. Inadequacy of consideration is no longer a sufficient reason by itself for setting aside a dealing with a reversionary interest, provided that the bargain was made *bonâ fide* (*l*), but it is still an important element to be taken into consideration by the court in determining whether a bargain is or is not unconscionable (*m*).

Who are "expectant heirs."

220. The term "expectant heirs" is used in this connection in its very widest meaning, and includes, besides heirs apparent or presumptive, all persons who have either vested or contingent remainders in any property, including a remainder in a portion (*n*), or who have any expectation of benefit on the death of a relative (*o*). The doctrine also extends to reversioners (*p*).

(*f*) *Chesterfield* (*Earl*) v. *Janssen* (1751), 2 Ves. Sen. 125, *per* Lord HARDWICKE, L.C., at p. 157.

(*g*) *Aylesford* (*Earl*) v. *Morris* (1873), 8 Ch. App. 484; *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814; *James* v. *Kerr* (1889), 40 Ch. D. 449, 460.

(*h*) *King* v. *Hamlet* (1834), 2 My. & K. 456, 473; and see *Talbot* v. *Staniforth* (1861), 1 John. & H. 484, 502, 503; *O'Rorke* v. *Bolingbroke*, *supra*, at p. 828; Sugden, Vendors and Purchasers, 11th ed., 316, 1084.

(*i*) See *Chesterfield* (*Earl*) v. *Janssen*, *supra*, where the age was thirty; *Beynon* v. *Cooke* (1875), 10 Ch. App. 389, where the age was forty.

(*k*) *Bromley* v. *Smith*, *Boustead* v. *Bromley*, *Smith* v. *Bromley* (1859), 26 Beav. 644, *per* ROMILLY, M.R., at p. 662; *Brenchley* v. *Higgins* (1900), 82 L. T. 143; affirmed, 83 L. T. 751, C. A.; and see *Bowes* v. *Heaps* (1814), 3 Ves. & B. 117; *Gwynne* v. *Heaton* (1778), 1 Bro. C. C. 1.

(*l*) Sales of Reversions Act, 1867 (31 & 32 Vict. c. 4), an Act to amend the law relating to the sale of reversions; but this Act has in no degree whatever shifted the onus from the person obtaining the beneficial interest of proving that the transaction was *bonâ fide* (*Aylesford* (*Earl*) v. *Morris*, *supra*, *per* Lord SELBORNE, L.C., at p. 490). For the cases on the law before the Act, see title EQUITY, Vol. XIII., p. 21.

(*m*) *Aylesford* (*Earl*) v. *Morris*, *supra*, at p. 490; *O'Rorke* v. *Bolingbroke*, *supra*; *Fry* v. *Lane*, *Re Fry*, *Whittet* v. *Bush* (1888), 40 Ch. D. 312, 321; *Seaton* v. *Lewis* (1895), 11 T. L. R. 430, C. A.; *Kevans* v. *Joyce*, [1896] 1 I. R. 442, C. A.; *Brenchley* v. *Higgins* (1900), 83 L. T. 751, C. A.

(*n*) *Beynon* v. *Cook*, *supra*, at p. 391; *Re Slater's Trusts* (1879), 11 Ch. D. 227, 238.

(*o*) *Ibid.*; *Nevill* v *Snelling* (1880), 15 Ch. D. 679.

(*p*) *Aylesford* (*Earl*) v. *Morris*, *supra*, at p. 497; *Tottenham* v. *Emmet* (1865), 14 W. R. 3.

The fact that a small portion of the property dealt with is in possession will not prevent the application of the above rules (*q*).

Equity will also grant relief against usurious loans on the security of reversionary interests (*r*), and if the transaction is unconscionable it is immaterial that the loan was made before the security was given (*s*).

Loans on reversions.

SECT. 3.—*Confirmation by Grantor.*

Ratification and acquiescence.

221. Transactions entered into under undue influence and unconscionable bargains are voidable at the instance of the grantor or his representatives (*t*), and not void *ab initio* (*a*). The grantor may lose his right to have them set aside either by his subsequent ratification, or by his passive acquiescence, to be inferred from his holding his hand for a considerable period of time, or in such circumstances that he must be taken to have determined not to impeach his grant (*b*).

During the continuance of the relation from which the presumption of undue influence arises there can be no ratification or acquiescence which will deprive the grantor of his remedy, for the influence which occasioned the transaction also prevents the grantor from asserting his rights (*c*). Similarly, there can be no ratification or acquiescence so long as the grantor remains in ignorance that the transaction was either invalid (*d*) or, at any rate, of questionable validity (*e*), and that he has a remedy (*f*): for while

(*q*) *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 154; see *Portmore* (*Lord*) v. *Taylor* (1831), 4 Sim. 182; *Nesbitt* v. *Berridge*, *Butler* v. *Berridge* (1863), 32 Beav. 282.

(*r*) *Miller* v. *Cook* (1870), L. R. 10 Eq. 641; *Beynon* v. *Cook* (1875), 10 Ch. App. 389; *Re Slater's Trusts* (1879), 11 Ch. D. 227; *Croft* v. *Graham* (1863), 2 De G. J. & Sm. 155, C. A.

(*s*) *Tyler* v. *Gates* (1870), L. R. 11 Eq. 265; affirmed (1871), 6 Ch. App. 665; see now Money-lenders Act, 1900 (63 & 64 Vict. c. 51); and title MONEY AND MONEY-LENDING.

(*t*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A., *per* LINDLEY, L.J., at p. 187; and see pp. 103, 106, *ante*.

(*a*) *Stump* v. *Gaby* (1852), 2 De G. M. & G. 623; *Allcard* v. *Skinner*, *supra*, at p. 186.

(*b*) *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n. (Belt's ed.); *Cole* v. *Gibbons* (1734), 3 P. Wms. 290; *Sibbering* v. *Balcarras* (*Earl*) (1850), 3 De G. & Sm. 735; *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, 147, C. A.; *Gresley* v. *Mousley* (1859), 4 De G. & J. 78, C. A.; *Turner* v. *Collins* (1871), 7 Ch. App. 329, 341; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.; *Allcard* v. *Skinner*, *supra*. See, further, title EQUITY, Vol. XIII., p. 169.

(*c*) *Gowland* v. *De Faria* (1811), 17 Ves. 20, 25; *Addis* v. *Campbell* (1841), 4 Beav. 401; *Gresley* v. *Mousley*, *supra*, at p. 96; *Moxon* v. *Payne* (1873), 8 Ch. App. 881, 886; *Fry* v. *Lane*, *Re Fry*, *Whittet* v. *Bush* (1888), 40 Ch. D. 312; see *King* v. *Hamlet* (1834), 2 My. & K. 456, 480, commented on in *Talbot* v. *Staniforth* (1861), 1 John. & H. 484, 502.

(*d*) *Salmon* v. *Cutts*, *Cutts* v. *Salmon* (1850), 4 De G. & Sm. 125; *Kempson* v. *Ashbee* (1874), 10 Ch. App. 15, 20.

(*e*) *Stump* v. *Gaby*, *supra*; *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Waters* v. *Thorn* (1856), 22 Beav. 547.

(*f*) *Purcell* v. *M'Namara* (1806), 14 Ves. 90, 120; *Wood* v. *Downes* (1811), 18 Ves. 120; *Roche* v. *O'Brien* (1810), 1 Ball & B. 330, 339; *Dunbar* v. *Tredennick* (1813), 2 Ball & B. 304, 317; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; *Tyars* v. *Alsop* (1889), 61 L. T. 8, C. A.; see, however, *Mitchell* v. *Homfray*, *supra*, at

SECT. 3. Confirmation by Grantor.

he remains in ignorance the alleged act of ratification will be taken to have been done not for the purpose of supporting the transaction if impeached, but for some other purpose (*g*). Ignorance, however, as to the nature of the remedy will not, if there be knowledge that some remedy exists, prevent ratification or acquiescence having effect (*h*).

If a part of the transaction which is impeached has been ratified the whole transaction must stand (*i*); so, where a settlor exercises a power of charging jointures and portions reserved to him by a settlement which would otherwise be voidable, the whole settlement is good (*k*).

Confirmation by will.

Gifts by will stand upon a different footing as to impeachment on the ground of undue influence (*l*). Accordingly, where a voidable conveyance *inter vivos* is confirmed by the will of the grantor the conveyance will be sustained, although the influence on account of which the conveyance is voidable continues until the death of the grantor (*m*), provided that the grantor when making the will knew that the conveyance was voidable, and intended an act of bounty for the benefit of the grantee (*n*). The disposition in such a case is testamentary, and the doctrines of ademption and lapse consequently apply (*o*).

Laches and delay.

222. The time within which the grantor must assert his remedy in order to avoid the transaction varies according to the circumstances of the case (*p*). The period during which the grantor remains under the undue influence or in ignorance that he has a remedy is disregarded, with the result that transactions have been impeached after a great lapse of time (*q*).

p. 591. See, further, as to material factors in deciding whether laches is to be imputed, title EQUITY, Vol. XIII., p. 170.

(*g*) *Waters* v. *Thorn* (1856), 22 Beav. 547, 560.

(*h*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 192, C. A.

(*i*) *Milner* v. *Harewood (Lord)* (1811), 18 Ves. 259.

(*k*) *Jarratt* v. *Aldam* (1870), L. R. 9 Eq. 463. See, further, titles POWERS; SETTLEMENTS.

(*l*) See p. 104, *ante*.

(*m*) *Stump* v. *Gaby* (1852), 2 De G. M. & J. 623; see, *contra*, *Lyon* v. *Home* (1868), L. R. 6 Eq. 655.

(*n*) *Waters* v. *Thorn*, *supra*.

(*o*) *Bizzey* v. *Flight* (1876), 3 Ch. D. 269. As to these doctrines, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 128 *et seq.*; WILLS.

(*p*) Contrast *Salmon* v. *Cutts*, *Cutts* v. *Salmon* (1850), 4 De G. & Sm. 125, and *Hatch* v. *Hatch* (1804), 9 Ves. 292; and see *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221, 239; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1279. See, further, title EQUITY, Vol. XIII., p. 169; and as to cases where special promptitude is required, *ibid.*, p. 173. These authorities are concerned with equitable rules: the legal periods after which claims are barred by "statute" are dealt with under title LIMITATION OF ACTIONS.

(*q*) *Hatch* v. *Hatch* (1804), 9 Ves. 292; *Gresley* v. *Mousley* (1859), 4 De G. & J. 78, 95, 96, C. A.; *Kempson* v. *Ashbee* (1874), 10 Ch. App. 15; *Turner* v. *Collins* (1871), 7 Ch. App. 329; *Allcard* v. *Skinner*, *supra*, at p. 187; and see *Beaden* v. *King* (1852), 9 Hare, 499, 532; *Blagrave* v. *Routh* (1856), 8 De G. M. & G. 620, C. A.; *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.

SECT. 4.—*Impeachment by Grantor.*

SECT. 4. Impeachment by Grantor.

Position of parties claiming through grantee.

223. A conveyance made in such circumstances as to be impeachable by the grantor as against the grantee is impeachable as against all volunteers claiming through the grantee (*r*). It is also impeachable as against a purchaser for value deriving title under the grantee who takes with notice of the grantor's equity, or of the circumstances from which the court infers such equity (*s*); but purchasers for value without notice of the circumstances in which the deed was executed are not affected by the equity, and so far as their interests are concerned the conveyance will be upheld (*a*).

Notice.

The mere fact that the purchaser knew when he took his conveyance that his vendor was the parent of, or stood in some other confidential relation to, the original grantor is not of itself sufficient to fix him with notice of the equity, but a little more than that, *e.g.*, that the original grantor had only recently attained his majority or resided with the vendor, is sufficient to do so (*b*).

Receipt clause.

224. A receipt clause in the body of a mortgage deed, executed by a client in favour of his solicitor, estops the mortgagor from denying, as against a purchaser for value from the mortgagee, although with knowledge of the relation subsisting between the mortgagee and mortgagor, that the consideration money was in fact paid (*c*).

Vendor and purchaser.

Although fixed with notice of a confidential relation subsisting between the original grantor and the original grantee, a purchaser or volunteer claiming through the original grantee can still, of course, uphold the original grant, if he can prove affirmatively that it was made voluntarily and deliberately, and with knowledge of its nature and effect (*d*). So, as between vendor and purchaser, the fact that the abstract of title discloses a purchase by a solicitor from his client, or some other transaction of such a nature as

(*r*) *Bainbrigge* v. *Browne* (1881), 18 Ch. D. 188.

(*s*) *Maitland* v. *Irving* (1846), 15 Sim. 437; *Addis* v. *Campbell* (1841), 4 Beav. 401; *Berdoe* v. *Dawson* (1865), 34 Beav. 603; *Kempson* v. *Ashbee* (1874), 10 Ch. App. 15, 21; *Bainbrigge* v. *Browne*, *supra*, at p. 197; *De Witte* v. *Addison* (1899), 80 L. T. 207, 212, C. A.; see also *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188; but as to this last-mentioned case, see note (*v*), p. 110, *ante*.

(*a*) *Cobbett* v. *Brock* (1855), 20 Beav. 524, 531; *Greenslade* v. *Dare* (1865), 20 Beav. 284; *Bainbrigge* v. *Browne*, *supra*.

(*b*) *Thornber* v. *Sheard* (1850), 12 Beav. 589; *Cobbett* v. *Brock*, *supra*; *Bainbrigge* v. *Browne*, *supra*; see, *contra*, *Molony* v. *Kernan* (1842), 2 Dr. & War. 31, 40, 41, where it was held that knowledge of the mere fact that the vendor was the agent of the original grantor was enough to fix the purchaser with notice.

(*c*) *Powell* v. *Browne* (1907), 97 L. T. 854, C. A.; *Saunders* v. *Kent*, [1885] W. N. 147. There would be no estoppel as between the mortgagor and mortgagee (*Gresley* v. *Mousley* (1862), 3 De G. F. & J. 433, C. A.). See title ESTOPPEL, Vol. XIII., p. 372.

(*d*) *Maitland* v. *Backhouse* (1847), 16 Sim. 58; *Espey* v. *Lake* (1852), 10 Hare, 260; *Baker* v. *Bradley* (1854), 2 Sm. & G. 531; *Berdoe* v. *Dawson*, *supra*; and see *Cook* v. *Lamotte* (1851), 15 Beav. 234, 241, 242; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, 299.

SECT. 4. Impeachment by Grantor.

possibly to be impeachable on the ground of undue influence, does not justify a purchaser in rescinding the contract if clear evidence is given that the transaction was in fact not vitiated by undue influence, even though such evidence does not include the testimony of the grantor, and the concurrence of the grantor or his representatives cannot be obtained (*e*).

(*e*) *Spencer* v. *Topham* (1856), 22 Beav. 573, 582; and see title SALE OF LAND.

FRAUDULENT ASSIGNMENT.

See BANKRUPTCY; FRAUDULENT AND VOIDABLE CONVEYANCES.

FRAUDULENT DEBTOR.

See BANKRUPTCY.

FRAUDULENT DISTRESS.

See BANKRUPTCY; DISTRESS.

FRAUDULENT REMOVAL OF GOODS.

See DISTRESS.

FREEBENCH.

See COPYHOLDS; REAL PROPERTY AND CHATTELS REAL.

FREEBOARD.

See BOUNDARIES AND FENCES; SHIPPING AND NAVIGATION.

FREE CROPPING.

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FREEHOLD.

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FREEMASONS.

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FRIENDLY SOCIETIES.

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Part I.—Nature and Classes of Friendly Societies.

SECT. 1.—*In General.*

Nature of friendly societies.

225. Friendly societies are voluntary associations formed for the purpose of raising, by the subscriptions of the members, funds out of which advances may be made for the mutual relief and the maintenance of the members, their wives, or children, in sickness, infancy, old age, or infirmity, and for kindred purposes (*a*). They may be either registered (*b*) or unregistered societies (*c*).

Registered and unregistered.

Friendly societies proper and collecting societies.

226. On the consolidation of the enactments relating to friendly societies in 1896 the legislation was divided into two parts, the first part (*d*) embodying the provisions affecting friendly societies proper, and the second (*e*) those relating to collecting societies. The latter enactment applies to unregistered as well as registered societies (*f*).

Registration of slate clubs.

227. A friendly society which lives only from year to year, periodically wiping its transactions "off the slate," is often termed "a slate club" (*g*). After meeting claims for sickness and death arising during any year, such a club at the close of the year divides the balance of its funds among its members, leaving a small sum to carry over in the new year, but making no sufficient reserve for

(*a*) Preamble to stat. (1793) 33 Geo. 3, c. 54; preamble to stat. (1819) 59 Geo. 3, c. 128. For detailed accounts of the origin, early history, and characteristics of benefit or thrift associations, see Preface to Pratt's Law of Friendly Societies (13th ed.), by Sir E. W. BRABROOK, C.B., late Chief Registrar of Friendly Societies (reprinted in 14th ed.); Bunyon's Law of Life Assurance, 4th ed., chap. xiii.; "Provident Societies and Industrial Welfare," Victorian Era Series, published by Blackie & Sons, Ltd., London; and Report of Chief Registrar, 1904, Appendix A, pp. 46—54. As to the distinction between a friendly society, a club, and a partnership, see *Flemyng* v. *Hector* (1836) 2 M. & W. 172; *Todd* v. *Emly* (1841), 7 M. & W. 427; *Re St. James' Club* (1852), 16 Jur. 1075). As to clubs, generally, see title CLUBS, Vol. IV., p. 405; and as to partnership, generally, see title PARTNERSHIP.

(*b*) See p. 123, *post*.

(*c*) See p. 127, *post*.

(*d*) *I.e.*, the Friendly Societies Act, 1896 (59 & 60 Vict c. 25). For the purpose of brevity this Act is generally referred to, throughout this title, as "the Act of 1896."

(*e*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26).

(*f*) *Ibid.*, s. 1.

(*g*) See *Re One and All Sickness and Accident Assurance Association* (1909), 25 T. L. R. 674.

SECT. 1. In General.

future contingencies. After the division has taken place, members wishing to continue as such for another year are not necessarily allowed to do so. Such a club may be registered on condition that its rules contain express provision for meeting, before the division is made, all claims existing at the time of division. The club is not required by law to make any provision for claims that are not existing, but prospective. As those prospective claims must increase as the ages of the members increase, no such club can be considered a permanent provision in case of sickness and mortality; and, although the risk of failure to meet such claims, in the absence of any reserve fund, is correspondingly increased, it is the practice of slate clubs to charge members the same contribution, whatever their age may be. A slate club that is not registered is within the Assurance Companies Act, 1909, unless exempted by the Board of Trade (*h*).

When friendly society is a charity.

228. If under the rules of a friendly society poverty is a necessary qualification for participation in the benefits of the society, the society may be a charity in the legal sense and enjoy the privileges of charitable institutions (*i*), but not otherwise (*j*). A friendly society does not become charitable because it receives donations and subscriptions (*k*). The word "benevolent" includes purposes that do not come within the technical meaning of "charitable purposes" (*l*). Friendly societies are exempted from registration under the Charitable Donations Registration Act, 1812 (*m*), and from the jurisdiction of the Charity Commissioners (*n*).

Exemption from registration as charities.

Application of Friendly Societies Act, 1896.

229. The Friendly Societies Act, 1896, applies (*o*) not only to societies registered under its provisions, but also to societies and branches subsisting before 1st January, 1897 (*p*), which, or the rules of which, have been registered, enrolled, or certified under any of the repealed Acts relating to friendly or cattle

(*h*) 9 Edw. 7, c. 49, ss. 1, 35; see title COMPANIES, Vol. V., pp. 620 *et seq.* As to registration of dividing societies, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 15.

(*i*) *Spiller* v. *Maude* (1881), 32 Ch. D. 158, n.; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154; *Re Buck, Bruty* v. *Mackey*, [1896] 2 Ch. 727; *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149; compare *Anon.* (1745), 3 Atk. 277; and see title CHARITIES, Vol. IV., pp. 110, 119.

(*j*) *Re Clark's Trust* (1875), 1 Ch. D. 497; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, C. A.; *Braithwaite* v. *A.-G.*, [1909] 1 Ch. 510.

(*k*) *Re Clark's Trust, supra*, at p. 500; *Re Buck, Bruty* v. *Mackey, supra*, at p. 733.

(*l*) *James* v. *Allen* (1817), 3 Mer. 17; and see note (*s*), p. 125, *post*, and title CHARITIES, Vol. IV., p. 146.

(*m*) 52 Geo. 3, c. 102, s. 12; and see title CHARITIES, Vol. IV., pp. 244, 245.

(*n*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; and see title CHARITIES, Vol. IV., p. 305.

(*o*) 59 & 60 Vict. c. 25, s. 101 (1).

(*p*) The date when the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), came into operation (*ibid.*, s. 108). The expression "registered society" (where used in this title) means a society registered under that Act, and includes societies subsisting at the commencement of the Act, to which the provisions of the Act apply (*ibid.*, s. 106; see also *ibid.*, ss. 8, 101). The Act extends to the whole of the United Kingdom, Channel Islands, and Isle of Man (*ibid.*, ss. 103—105, 108; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (1)).

insurance societies (*q*). The rules of societies and branches registered under such repealed Acts, so far as they are not contrary to any express provision of the existing statutes, continue in force until altered or rescinded (*r*).

Objects of a friendly society.

The objects of a registered society must be among those specified in the Act of 1896 (*s*). It is *ultra vires* to apply the funds of a society to purposes other than those expressed in the rules (*t*).

Advantages of registration.

230. A registered society has many statutory advantages over an unregistered society formed for the like purposes. In the case of a specially authorised society (*u*) the statutory advantages (*a*) are subject to the limitation, if any, of the special authority.

SECT. 2.—*Different Classes of Friendly Societies.*

SUB-SECT. 1.—*Societies capable of being registered.*

What societies may be registered.

231. Five classes of societies are capable of registration under the Act of 1896 (*b*), namely, friendly societies, cattle insurance societies, benevolent societies, working men's clubs, and specially authorised societies (*c*).

(*q*) In *Re Meredith and Whittingham* (1856), 1 C. B. (N. S.) 216, it was held that, where a friendly society enrolled its rules in 1832, under stat. (1829) 10 Geo. 4, c. 57, and shortly afterwards framed new rules, which were never enrolled or certified, it was a subsisting society under the original rules. It follows from the rule stated in the text that societies registered under the repealed Acts are registered societies within the meaning of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), even where their objects are not among those enumerated in s. 8 of that Act.

(*r*) *Ibid.*, s. 101 (1). This section does not by implication enable societies established before 1850 to alter their rules, if the rules themselves do not provide for such alteration (*Souter* v. *Davies* (1895), 15 R. 261; see stat. (1855) 18 & 19 Vict. c. 63, s. 27).

(*s*) 59 & 60 Vict. c. 25, s. 8; see p. 124, *post*.

(*t*) *Dunkley* v. *Harrison* (1887), 51 J. P. 788, where it was held that funds applicable for the relief of members falling sick, lame, or blind, or being otherwise disabled from work, could not be applied for the support of a member who was disabled merely by old age.

(*u*) As to specially authorised societies, see note (*b*), p. 125, *post*.

(*a*) *E.g.*, it can legally hold land (not exceeding one acre in the case of a benevolent society) and other kinds of property in the names of trustees, such property passing from one trustee to another (except in the case of copyholds or stock in the funds), by the mere fact of their appointment, and can carry on all legal proceedings in the trustees' names (see p. 145, *post*; as to copyholds, see p. 169, *post*). It has other advantages as regards criminal remedies for fraud by members (pp. 170, 186, 187, *post*), preference over creditors of an officer in respect of property in his possession by virtue of his office (p. 162, *post*), transfer of stock to new trustees (p. 170, *post*), freedom from stamp duties (p. 161, *post*), receipts from members over sixteen (p. 147, *post*), cost of certificates of birth or death (note (*m*), p. 152, *post*), investments with National Debt Commissioners (p. 167, *post*), holding copyholds (p. 169, *post*), discharging mortgages by indorsed receipt (p. 166, *post*), disputes (pp. 175 *et seq.*, *post*), insurance without insurable interest (pp. 124, 156, *post*), nomination (p. 152, *post*), audit (p. 173, *post*), record of rules etc. (p. 137, *post*), income tax (p. 161, *post*), and exemption from the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), p. 164, *post*.

(*b*) 59 & 60 Vict. c. 25.

(*c*) *Ibid.*, s. 8 (1)—(5). As to the registration of trade unions under the Friendly Societies Act, 1896, see *Old* v. *Robson* (1890), 59 L. J. (M. C.) 41; *Swaine* v. *Wilson* (1889), 24 Q. B. D. 252, C. A.; and title TRADE AND TRADE UNIONS.

SECT. 2.
Different Classes of Friendly Societies.

What friendly societies may be registered.

232. Friendly societies capable of being registered are societies formed for the purpose of providing, by voluntary (*d*) subscriptions of the members thereof, with or without the aid of donations, for any one or more of the objects enumerated in the following six classes (*e*):—

(1) The relief or maintenance (*f*) of the members, their husbands, wives, children (*g*), fathers, mothers, brothers or sisters, nephews or nieces (*h*), or wards being orphans, during sickness (*i*) or other infirmity, whether bodily or mental, in old age (meaning any age after fifty) or in widowhood (*k*), or for the relief or maintenance during minority of the orphan children of members (*l*).

(2) Insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member, or, as respects persons of the Jewish persuasion, for the payment of a sum of money during the period of confined mourning (*m*);

(3) The relief or maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck or loss or damage of or to boats or nets (*n*);

(*d*) *I.e.*, not compulsory. It is conceived that the word "voluntary" used in connection with subscriptions to friendly societies cannot be used in the legal sense as meaning "without consideration," as members of such societies gain the benefit of insurance. Moreover, such an interpretation would prevent every friendly society from being registered. The expression "voluntary contributions" in the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1, has, however, been interpreted as meaning "without consideration" (*Savoy Overseers etc.* v. *Art Union of London*, [1896] A. C. 296, 310).

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8; Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 1; and see *Knowles* v. *Booth* (1883), 32 W. R. 432. The Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8, provides only for the insurance of members themselves, and apparently by themselves, and the insurance by a society of a sum to be paid to the employee of the society as compensation under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), should, where provided for, be secured as one of the expenses incident to management (Report of Chief Registrar, 1907, p. 10). The Assurance Companies Act, 1909 (9 Edw. 7, c. 49), does not apply to registered friendly societies (*ibid.*, s. 1).

(*f*) As to when a member is entitled to a permanent allowance when prevented from following his customary employment, see *Manchester Law Clerks' Friendly Society* v. *Wilson* (1888), 4 T. L. R. 465.

(*g*) The expression "children" is not limited to the children in existence at the date when a policy is taken out; see *Atkinson* v. *Atkinson*, [1895] W. N. 114.

(*h*) Only legitimate relations can support a claim of being beneficiaries; but compare *Corner* v. *Oddfellows' Friendly Society* (1882), 46 J. P. 809, where there was evidence that a society intended to recognise marriage with a deceased wife's sister, and was accordingly debarred from objecting to a claim for general allowance by children.

(*i*) "Sickness" includes "insanity" unless the rules of the society expressly exclude mental ailments (*Burton* v. *Eyden* (1873), L. R. 8 Q. B. 295); see also *Church* v. *Great Southern Sick and Burial Society* (1890), Diprose and Gammon, 306 (county court).

(*k*) The expression "widow" is not confined to the person who was wife of the insurer at the date of the policy (*Atkinson* v. *Atkinson*, *supra*). See further, *Re Parker's Policies*, *Parker* v. *Parker*, [1906] 1 Ch. 526.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (1) (a).

(*m*) *Ibid.*, s. 8 (1) (b).

(*n*) *Ibid.*, s. 8 (1) (c).

(4) The endowment of members or nominees at any age (*o*);

(5) The insurance against fire to any amount not exceeding £15 of the tools or implements of the trade or calling of the members (*p*); or

(6) The guaranteeing the performance of their duties by officers and servants of the society or any branch thereof (*q*).

Other societies which may be registered.

233. The four other classes of societies which may also be registered are:—(1) "cattle insurance societies," for the purpose of insurance against loss of neat cattle, sheep, swine, horses, and other animals by death from disease or otherwise (*r*); (2) "benevolent societies," for any benevolent or charitable purpose (*s*); (3) working men's clubs, for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation (*a*); and (4) societies specially authorised by the Treasury to be registered for any purpose, and to which some or all of the provisions of the Friendly Societies Act, 1896, are extended by the authority (*b*).

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (1) (d). Endowment may be effected by means of annuities (see *ibid.*, ss. 16, 41).

(*p*) *Ibid.*, s. 8 (1) (e).

(*q*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 1.

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (2); and see p. 139, *post*. The expression "other animals," it is conceived, includes only animals *ejusdem generis*.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (3). Presumably the purpose of benevolent societies is to provide benefits for persons other than those who would come within the class of persons benefited by friendly societies (see *ibid.*, s. 8 (1)). The point whether such societies may be established for purposes of general benevolence, as distinguished from specified purposes, has not been decided by the courts. As to the meaning of the expression "charitable purposes," see title CHARITIES, Vol. IV., pp. 108—117.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (4). See title CLUBS, Vol. IV., p. 409. As to the certification of shop clubs or thrift funds by the Registrar of Friendly Societies, see title CLUBS, Vol. IV., p. 410; Report of Chief Registrar, 1902, pp. 3—5; *Balchin* v. *Ebury* (*Lord*) (1903), 20 T. L. R. 60.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c 25), s. 8 (5). The purposes authorised by the Treasury under this section or the corresponding section in one of the repealed Friendly Societies Acts are as follows: To create funds by monthly or other subscriptions to be lent out to, or invested for, the members of the society, or for their benefit, pursuant to the Friendly Societies Act, 1896 (authority of 23rd April, 1903, in substitution for that of 16th May, 1876); assisting members out of employment (20th March, 1877); defending members of any trade against frivolous or malicious prosecutions, and, in cases of crimes, affording them legal or other assistance for the detection or prosecution of the offenders (22nd March, 1877); providing the members with legal and other assistance when claiming compensation under the Employers' Liability Acts (27th February, 1893); promoting thrift among the labouring classes by affording them the opportunity of depositing their savings at interest (23rd March, 1877, modified in 1883); guaranteeing the performance of their duties by officers of friendly societies, and guaranteeing the money or properties of friendly societies against loss by robbery or embezzlement (31st January, 1878, modified and limitations revised 3rd March, 1905); enabling persons of the Jewish religion to provide for the due celebration of the Passover (18th December, 1883); the promotion of science, literature, the fine arts (5th July, 1878), music (3rd October, 1879), education (10th April, 1890), the science of cookery (4th March, 1891), agriculture, arboriculture or horticulture (23rd March, 1877, modified 9th January, 1907, limitations revised 20th January, 1891); the promotion of angling (15th June, 1893), bicycling (24th March, 1888), quoit-playing (6th April, 1878), swimming, life-saving, and resuscitation

SECT. 2. **Different Classes of Friendly Societies.**

Construction of statutory and special purposes.

Registration under the Companies (Consolidation) Act, 1908 (*c*), is not necessary in the case of a society authorised by the Treasury (*d*). Where the society combines with any specially authorised purpose any of the purposes hereinbefore specified (*e*), the society is not, in respect of any of its purposes, entitled to any privilege or exemption of the Act of 1896 not contained in the provisions specified in the authority; but, as regards every purpose not specially authorised, it continues subject to all the duties and obligations imposed by the Act of 1896, whether contained in such specified provisions or not (*f*).

Registry of dividing societies.

234. Dividing societies, other than benevolent societies or working men's clubs, are not disentitled to registry, if the rules of the society contain distinct provision for meeting all claims upon the society existing at the time of division before the division takes place (*g*).

SUB-SECT. 2.—*Societies incapable of being registered.*

Societies incapable of being registered.

235. A friendly society which contracts with any person for the assurance of an annuity exceeding £52 per annum, or of a gross sum exceeding £300, cannot now be registered (*h*); but policies effected prior to 15th August, 1850, for amounts exceeding this limit remain valid (*i*). A society consisting of less than seven members cannot be registered (*j*), nor can a society, other than a benevolent society or working men's club, which under any rule or practice divides any part of its funds, unless the rules contain

(21st February, 1905); the mutual protection and promotion of the interests of friendly societies (8th May, 1893).

(*c*) 8 Edw. 7, c. 69. As to such registration, see, generally, title COMPANIES, Vol. V., pp. 59 *et seq.*

(*d*) *Peat* v. *Fowler* (1886), 55 L. J. (Q. B.) 271, where the registration of the society was authorised by the Treasury under the corresponding section (8 (5)) of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60).

(*e*) See p. 124, *ante*.

(*f*) Treasury Regulations, 1897 (3) (Statutory Rules and Orders Revised, Vol. V., Friendly Society, p. 1).

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 15, Sched. I. (9). Members may be restrained by injunction from an illegal division of the funds of a society (*Scott* v. *Peel* (1895), Diprose and Gammon, 277). As to trustees' liability for such illegal division, see *Cox* v. *James* (1882), Diprose and Gammon, 282; and p. 145, *post*. As to slate clubs, see p. 121, *ante*.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (1) (proviso); *ibid.*, s. 41; Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 3. It is to be observed that by s. 3 of the Act of 1908, £300 is substituted for £200 in s. 41 of the Act of 1896, but that s. 3 omits to state that the same substitution is to apply in s. 8 (1) (f) of the Act of 1896. Where a scheme, certified under the Workmen's Compensation Acts, 1897 (60 & 61 Vict. c. 37) or 1906 (6 Edw. 7, c. 58), provides for payment of compensation by a friendly society, the rule set out in the text does not apply in respect of such scheme (Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I. (15); Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (21)). Societies which effect policies of assurance payable at death exceeding the sum of £1,000 are subject to the Friendly Societies Discharge Act, 1854 (17 & 18 Vict. c. 56). Such societies ceased to be friendly societies from and after the passing of that Act (1854) (see *ibid.*, s. 1), and, therefore, they do not come within the scope of this article; see title INSURANCE.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 101 (2); *Clayton* v. *Owen* (1862), 31 Beav. 285.

(*j*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (1).

distinct provision for meeting all claims upon the society before the division takes place (*k*).

SECT. 2. Different Classes of Friendly Societies.

SUB-SECT. 3.—*Unregistered Societies.*

236. The status of unregistered friendly societies is doubtful (*l*), though they are recognised to some extent by the Act of 1896 (*m*).

Whether illegal under Companies Act.

Thus an unregistered friendly society, unless formed before 2nd November, 1862 (*n*), may be illegal for lack of registration as a company (*o*). Even assuming an unregistered friendly society to be an illegal association within the meaning of the Companies (Consolidation) Act, 1908 (*p*), such a society can maintain an action for the purpose of recovering the money of the members from a defaulting treasurer (*q*), but not an action in furtherance of the objects of the society (*r*); further, the members of an association illegal for want of registration under the same Act (*s*) may, as joint owners of property, be entitled to protection under the Larceny Act, 1868 (*t*); and a bond given to the treasurer of an unregistered friendly society may be sued upon by him (*u*).

Action maintainable by unregistered society.

Property of unregistered society.

237. An unregistered friendly society resembles a club (*a*) rather than a partnership (*b*).

Not a partnership.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 15; see p. 122, *ante*.

(*l*) *Clough* v. *Ratcliffe* (1847), 16 L. J. (CH.) 476.

(*m*) 59 & 60 Vict. c. 25, ss. 43, 62—66 (*Marrs* v. *Thompson* (1902), 86 L. T. 759, *per* CHANNELL, J.; *Knowles* v. *Booth* (1883), 32 W. R. 432; see also Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), and Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1.

(*n*) The date when the Companies Act, 1862 (25 & 26 Vict. c. 89), came into operation; see *Shaw* v. *Simmons* (1883), 12 Q. B. D. 117.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1 (re-enacting the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, under which a loan society (*Shaw* v. *Benson* (1883), 11 Q. B. D. 563, C. A.) and a mutual benefit society (*Jennings* v. *Hammond* (1882), 9 Q. B. D. 225) were held illegal associations for want of registration). Such a society may, however, come within the exception in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1, of a society formed in pursuance of another Act of Parliament, namely, the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), which contemplates the existence of unregistered friendly societies (*Marrs* v. *Thompson*, *supra*, *per* CHANNELL, J.). An unregistered dividing society is not illegal (*Re One and All Sickness and Accident Assurance Association* (1909), 25 T. L. R. 674). As to whether the object of a friendly society is the acquisition of gain, see *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A. (mutual marine insurance company); and title COMPANIES, Vol. V., pp. 39, 45.

(*p*) 8 Edw. 7, c. 69.

(*q*) *Marrs* v. *Thompson*, *supra*, *per* Lord ALVERSTONE, C.J., and DARLING, J.; compare *R.* v. *Winfer* (1878), Diprose and Gammon, 527. As to legal proceedings by and against societies, see p. 190, *post*.

(*r*) *Marrs* v. *Thompson*, *supra*; *Jennings* v. *Hammond*, *supra* (mutual benefit society); *Shaw* v. *Benson*, *supra* (loan society); *Aberdeen Master Masons' Incorporation, Ltd.* v. *Smith*, [1908] S. C. 669 (title to sue of unregistered incorporated society not a trade union).

(*s*) 8 Edw. 7, c. 69.

(*t*) 31 & 32 Vict. c. 116, s. 1. See *R.* v. *Stainer* (1870), L. R. 1 C. C. R. 230; *R.* v. *Tankard*, [1894] 1 Q. B. 548, C. C. R. (unregistered trading club of more than twenty persons, treasurer convicted for embezzlement). See also title COMPANIES, Vol. V., p. 767.

(*u*) *Jones* v. *Woollam* (1822), 5 B. & Ald. 769.

(*a*) See title CLUBS, Vol. IV., pp. 406, 420.

(*b*) *Oldham Our Lady's Sick and Burial Society* v. *Taylor* (1887), 3 T. L. R.

SECT. 2. SUB-SECT. 4.—*Collecting Societies.*

Different Classes of Friendly Societies.

Definition.

238. A collecting society is a friendly society which receives contributions from its members by means of collectors at a greater distance than ten miles, measured in a straight line in a horizontal plane (*c*), from its registered office (*d*).

Definition of "collector."

239. The expression "collector" includes every paid officer, agent, or person, however remunerated, who, by himself or by any deputy, collects contributions for a collecting society or holds any interest in a collecting book, but does not include (1) the secretary or other officer of a branch of a society who receives contributions on behalf of the society or of any other branch; or (2) any officer appointed to superintend and receive moneys from collectors within a specified area, not being himself a collector; or (3) any agent appointed and remunerated by members, and not under the control of the society or of any officer thereof (*e*).

General provisions.

All collecting societies, whether registered or unregistered, are subject to the provisions of the Collecting Societies and Industrial Assurance Companies Act, 1896 (*f*), except, so far as regards the provisions of the Act which are required to be set out in the rules, those registered societies which have been specially exempted by the registrar (*g*).

Application of Friendly Societies Act, 1896.

In addition to the provisions required to be set out in the rules, it is provided that the sections of the Friendly Societies Act, 1896 (*h*), relating to the appointment of inspectors, the calling of special meetings, and dissolution shall apply to collecting societies, and in the case of a society with branches, shall so apply without the consent of the central body (*i*). There are also

Notices.

certain provisions as to offences (*j*). Notices required to be served on any person must be in writing, and delivered or sent by post,

472, C. A. (though formerly it was otherwise); *Beaumont* v. *Meredith* (1814), 3 Ves. & B. 180; *Silver* v. *Barnes* (1839), 6 Bing. (N. C.) 180 (mutual benefit society); *Lloyd* v. *Loaring* (1802), 6 Ves. 773 (Freemasons' lodge). As to the definition of a partnership, see title PARTNERSHIP.

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 34.

(*d*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 1.

(*e*) *Ibid.*, s. 17 (1); see *Joyce* v. *Northumberland Miners' Friendly Society* (1888), 4 T.L. R. 525.

(*f*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 1. Registered collecting societies, as friendly societies, are also subject to the provisions of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

(*g*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 11. See *Joyce* v. *Northumberland Miners' Friendly Society*, *supra*. As to the provisions required to be in the rules, see p. 139, *post*. So long as an exemption is in force the society is subject to all the provisions of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), as if it were a friendly society not receiving contributions by means of collectors at a greater distance than ten miles from the registered office (Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 11 (3)). An exemption may be revoked, but notice of revocation must be given by advertisement in the *London Gazette* and a local newspaper, and by registered letter to the society (*ibid.*, s. 11 (2)).

(*h*) 59 & 60 Vict. c. 25, ss. 76, 78—83. See these sections referred to pp. 159, 174 *et seq.*, 197 *et seq.*, *post*.

(*i*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 12.

(*j*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), ss. 14, 15; see p. 188, *post*.

or, in case of a notice of default, left at his last known place of abode (*k*).

An unregistered collecting society is subject to the provisions of the Assurance Companies Act, 1909 (*l*), unless exempted by the Board of Trade under that Act.

Provisions as to assurance.

240. Amongst the purposes for which a collecting society may issue policies of assurance are included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister (*m*).

No policy effected with such a society before the date (*n*) of the passing of the Assurance Companies Act, 1909, is void by reason only that (1) the person effecting the policy had not at the time an insurable interest in the life of the person assured; or (2) the name of the person interested or for whose benefit the policy was effected was not inserted in the policy; or (3) the insurance was not one authorised by the Acts relating to friendly societies where the policy was effected by or on account of a person who had at the time a *bonâ fide* expectation that he would incur expenses in connection with the death or funeral of the assured, and where the sum assured is not unreasonable for the purpose of covering those expenses. Any such policy enures for the benefit of the person for whose benefit it was effected or his assigns (*o*).

A collecting society which, since the passing of the Assurance Companies Act, 1909, issues policies of insurance which are not within its legal powers is deemed to have made default in complying with the requirements of that Act, and the provisions of that Act as to default (*p*) apply (*q*).

Part II.—Registration.

SECT. 1.—*The Registry.*

The Central Office.

241. The Chief Registrar of Friendly Societies and one or more assistant registrars constitute the Central Office of the Registry of Friendly Societies for England (*r*). These officials are appointed by and hold office during the pleasure of the Treasury (*s*), the

(*k*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 16.
(*l*) 9 Edw. 7, c. 49, ss. 1, 35.
(*m*) *Ibid.*, s. 36 (1).
(*n*) 3rd December, 1909.
(*o*) *Ibid.*, s. 36 (2).
(*p*) *Ibid.*, s. 24.
(*q*) *Ibid.*, s. 36 (3). See title COMPANIES, Vol. V., p. 626.
(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 1 (1). The Central Office for England is at 28, Abingdon Street, London, S.W. There are now two assistant registrars (Treasury Regulations, 1897 (2)). As to the functions of assistant registrars, generally, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 3, and as to the salaries and expenses of the Chief Registrar and assistant registrars and of the offices, see *ibid.*, s. 5. In England the expression "the registrar" is equivalent to the expression "the Central Office"; see *ibid.*, s. 106.
(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 1 (3). As to the Treasury, see title CONSTITUTIONAL LAW, Vol. VII., pp. 100 *et seq.*

SECT. 1. The Registry.

Chief Registrar being a barrister of not less than twelve years' standing, and one at least of the assistant registrars for England being a barrister or solicitor of not less than seven years' standing (*t*).

Functions of registrar.

242. In the case of friendly societies or branches, registered or about to be registered, the functions of the registrar, some of which are specifically those of the Chief Registrar, include acknowledgments of registry (*u*), the registry of rules and of alterations of rules (*a*), and the approval of changes of name (*b*). The registrar also prescribes the form of, and receives, the annual accounts and statements (*c*). In certain circumstances he investigates the affairs of and dissolves societies, and suspends and cancels registry (*d*), decides disputes (*e*), and approves the conversion of a society into a branch (*f*). He is, moreover, charged with the duty of laying before Parliament an annual report of the accounts of all registered societies and branches, and of the proceedings of the registry (*g*).

Deposit of documents.

243. At the Central Office are deposited all the documents recording the chief events in the histories of registered societies and branches, namely, amendments of rules (*h*), notices of changes of office (*i*), appointments of new trustees (*k*), annual returns and quinquennial valuations (*l*), certain special resolutions (*m*), and instruments of dissolution (*n*). These are registered there with the rules of the societies respectively concerned, and any observations of the registrar (*o*).

Authentication.

Documents requiring authentication by the Central Office are authenticated by its seal (*p*). Documents bearing the seal or stamp of the Central Office are to be received in evidence without further proof, and documents purporting to be signed by the Chief Registrar or any assistant registrar or any inspector or public auditor or valuer under the Act of 1896 are, in the absence of evidence to the contrary, to be received in evidence without proof of the signature (*q*).

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 1 (4).
(*u*) *Ibid.*, ss. 11, 18, 19; see pp. 131—134, *post.*
(*a*) *Ibid.*, ss. 9 (2), 13 (2), 17; see pp. 138—141, *post.*
(*b*) *Ibid.*, s. 69; see p. 135, *post.*
(*c*) *Ibid.*, s. 2 (2); see p. 173, *post.*
(*d*) *Ibid.*, ss. 76—83; see pp. 174, 201, 203 *post.*
(*e*) *Ibid.*, s. 68; see p. 183, *post.*
(*f*) *Ibid.*, s. 73; see p. 195, *post.*
(*g*) *Ibid.*, s. 6.
(*h*) *Ibid.*, ss. 13 (1), 19.
(*i*) *Ibid.*, s. 24 (1); see p. 136, *post.*
(*k*) *Ibid.*, s. 25 (3); see p. 144, *post.*
(*l*) *Ibid.*, ss. 27, 28; see pp. 171, 173, *post.*
(*m*) *Ibid.*, s. 75; see p. 160, *post.*
(*n*) *Ibid.*, s. 79 (5); see p. 198, *post.*
(*o*) *Ibid.*, s. 7; see note (*r*), p. 129, *ante.*
(*p*) Treasury Regulations, 1897 (1) (Statutory Rules and Orders Revised, Vol. V., Friendly Society, p. 1).
(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 100. As to the recital in a magistrate's order being evidence, see *R.* v. *Gilkes* (1828), 8 B. & C. 439.

SECT. 2.—*Conditions of Registration.*

SECT. 2. Conditions of Registration.

244. A society cannot be registered (*r*) unless it consists of at least seven persons (*s*).

Number of members.

245. An application to the registrar to register a society must be signed by seven members and the secretary (who need not be a member of the society), and sent to the Central Office with two printed copies of the rules and a list of the names of the secretary and of every trustee or other officer intended to be authorised to sue or be sued on behalf of the society (*t*).

Application for registration.

In the case of a society assuring an annuity certain in amount, whether to members or others, the tables of contributions for the assurance certified by the actuary to the National Debt Commissioners, or by some actuary of at least five years' standing approved by the Treasury, must also be sent to the registrar with the application for registry (*u*). But this rule does not apply to a friendly society where a scheme is certified under the Workmen's Compensation Acts, 1897 or 1906, providing for payment of compensation by such society (*w*).

Register of societies assuring annuities.

246. The registrar, if satisfied that a society or a branch (*a*) has complied with the statutory provisions as to registry, issues

Acknowledgment of registry.

(*r*) No fee is payable on the registration of any friendly, benevolent, or cattle insurance society, or working men's club, or of any amendment of the rules thereof (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 96 (2)). A fee of £1, payable in advance, must be paid for the acknowledgment of registry of a specially authorised society (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 96 (1); Treasury Regulations, 1897 (70)); as to such societies, see p. 125, *ante*. Fees received by any registrar under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), are to be paid into the Exchequer (s. 96 (3)), but no fee is payable where the society is a society registered, or to be registered, under the special authority of 16th May, 1876, or of 23rd April, 1903, and where it has in its rules provisions (1) that no part of its funds shall be divided by way of profit, bonus, dividend, or otherwise among its members, and (2) that all money lent to members shall be applied to such purpose as the society or its committee of management may approve (Treasury Regulations, 1903, (70A); Societies' Borrowing Powers Act, 1898 (61 & 62 Vict. c. 15), s. 2). As to the above-mentioned special authorities, see note (*b*), p. 125, *ante*.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (1). Registration under the Act is voluntary. As to the right of a majority of the members of an unregistered society to compel registration, see *Oldham Our Lady's Sick and Burial Society* v. *Taylor* (1887), 3 T. L. R. 472, C. A.; *M'Kenny* v. *Barnsley Corporation* (1894), 10 T. L. R. 533, C. A. As to membership, see p. 147, *post*.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (2); Treasury Regulations, 1897 (3), Form A; Encyclopædia of Forms and Precedents, Vol. VI., p. 20 (form of application for registry by a friendly or cattle insurance society); *ibid.*, p. 24 (form of application for registry by a benevolent society, working men's club, or specially authorised society); *ibid.*, p. 26 (form of application by a society to the Treasury for a special authority). As to the appointment of trustees to sue or be sued, see also the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 25, 94, and p. 144, *post*.

(*u*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 16.

(*w*) Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I. (15); Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., 21. As to the effect of such a scheme, see *Horn* v. *Admiralty* (*Lords Commissioners*), [1911] 1 K. B. 24, C. A.

(*a*) For meaning of "branch," see note (*o*), p. 133, *post*.

SECT. 2. Conditions of Registration.

an acknowledgment (*b*) specifying the designation and classification (*c*) of the society or branch (*d*). The acknowledgment is conclusive evidence of due registration, unless the registry of the society or branch has been suspended or cancelled (*e*), but is not conclusive evidence of the legality of the rules of a society (*f*). Proof of registry of a branch does not prevent evidence being adduced of its secession from the society (*g*).

Acknowledgment of registry of specially authorised society.

Where the society is a specially authorised society, to which only certain specified provisions of the Act of 1896 are to be extended, such specification must be inserted in the acknowledgment of registry (*h*).

Refusal to register.

247. If the Central Office refuses to register a society or a branch, an appeal lies, probably by way of mandamus, to the High Court (*i*).

Society carrying on business in more than one part of the United Kingdom.

248. A society carrying on or intending to carry on business in more than one part of the United Kingdom must be registered in the part in which its registered office is situate; but the rules and registered amendments of rules of such society must be recorded by the registrars of the other parts, and copies must be sent to them for that purpose (*k*).

No privileges until rules recorded.

Until the rules are recorded, the society is not entitled to any of the statutory privileges in the part of the United Kingdom in which the rules have not been recorded, and until the amendments of rules are recorded they have no effect in that part (*l*).

Registration under Licensing Act.

249. The working men's clubs, which are registered under the Friendly Societies Acts, and which occupy premises habitually used

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 11, 19. For forms of acknowledgment, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. II., Part I.; and of specially authorised societies, see Treasury Regulations, 1897 (4), Form A 2.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8; and p. 123, *ante*.

(*d*) *Ibid.*, ss. 11, 19.

(*e*) *Ibid.*; *R.* v. *Kew* (1885), Diprose and Gammon, 242; see *Peel's Case* (1867), 2 Ch. App. 674; *Re Overend, Gurney & Co., Oakes* v. *Turquand and Harding*, *Peek* v. *Same* (1867), L. R. 2 H. L. 325, 354; *Pare* v. *Clegg* (1861), 29 Beav. 589; *Hodges* v. *Wale* (1853), 2 W. R. 65; *McGlade* v. *Royal London Mutual Insurance Society, Ltd.*, [1910] 2 Ch. 169, C. A.

(*f*) *Davie* v. *Colinton Friendly Society* (1870), 8 Sc. L. R. 100. Under the old law the certificate of the registrar was not conclusive as to the legality of a society or its rules (*R.* v. *Davis* (1866), 14 W. R. 329); see further, p. 142, *post*.

(*g*) *Wilkinson* v. *Jagger* (1887), 20 Q. B. D. 423.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 8, 9; Treasury Regulations, 1897 (3). The acknowledgment of registry of a specially authorised society is in Treasury Regulations, 1897 (4), Form A 2. As to the fee payable, see note (*r*), p. 131, *ante*.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 12, 19 (b). See *ibid.* for appeals in cases of refusals to register by the assistant registrars of Scotland or Ireland. As to mandamus, generally, see title CROWN PRACTICE, Vol. X., p. 7.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 14 (1). For form of application to record rules of a society registered in another country, see Treasury Regulations, 1897 (8), Form E, and for form of application to record amendment of rules already recorded, see Treasury Regulations, 1897 (8), Form F.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 14 (2).

for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, must be registered also under the Licensing (Consolidation) Act, 1910 (*m*).

SECT. 2. Conditions of Registration.

A society is not incorporated by being registered under the Friendly Societies Acts (*n*).

SECT. 3.—*Societies with Branches.*

250. Where it is desired to register a society possessing branches, the society and branches may be registered simultaneously, or, it seems, the society may be registered first and the branches afterwards.

Registry of societies with branches.

Applications for the simultaneous registration of a society and its branches (*o*) must be accompanied by (1) a list of the branches and notice of the place where the registered office of each branch is situated (*p*); and (2) if any branch is to have trustees or officers authorised to sue and be sued on its behalf, other than the trustees or officers authorised to sue and be sued on behalf of the society, a list of the names of all such officers or trustees, distinguishing the branches for which they are authorised to sue and be sued (*q*); and (3) if the rules of all the branches are, or are intended to be identical, a statement to that effect and copies of these rules (*r*) and (4) if the branch rules are not, or are not intended to be identical, a statement to that effect and copies of all branch rules (*s*).

Applications.

If an unregistered society with branches decides by a majority vote to register itself, it is not open for the minority to secede and establish a new society (*t*). By registration a branch becomes part of the registered society (*u*).

A society which has a fund, under the control of a central body, to which every branch is bound to contribute, may be registered as a single society. A society of this kind, which has branches in

Central fund.

(*m*) 10 Edw. 7 & 1 Geo. 5, c. 24, s. 91 (1); see titles CLUBS, Vol. IV., pp. 431 *et seq.*; INTOXICATING LIQUORS. There is no provision by which the striking off the register, under that Act, of a club vacates registry under the Friendly Societies Acts; see Report of Chief Registrar, 1902, p. 5.

(*n*) See title COMPANIES, Vol. V., pp. 67, 625.

(*o*) The expression "branch" means any number of the members of a society under the control of a central body, having a separate fund, administered by themselves or by a committee or officers appointed by themselves, and bound to contribute to a fund under the control of a central body (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106). The term "lodge" is generally used to denote a branch; other expressions are "senate," "sub-division," "court," or "tent." The terms "district" and "grand division" are applied to branches of that nature. A lodge may form part of a district, which is a higher sub-division of a union or central body. See further, as to nature of branches, *Schofield* v. *Vause* (1886), 36 W. R. 170, n., C. A.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 17 (1) (a). As to the necessity for every registered branch having a registered office, see *ibid.*, s. 24.

(*q*) *Ibid.*, s. 17 (1) (b).

(*r*) *Ibid.*, s. 17 (1) (c).

(*s*) *Ibid.*, s. 17 (1) (d).

(*t*) *M'Kenny* v. *Barnsley Corporation* (1894), 10 T. L. R. 533, C. A.; see *Grand United Order of Oddfellows* v. *Village Pride Lodge* (1894), Diprose and Gammon, 303.

(*u*) *M'Kenny* v. *Barnsley Corporation*, *supra*.

SECT. 3. Societies with Branches.

more than one part of the United Kingdom, is, so far as registry is concerned, subject to the provisions previously stated (*a*) which apply to societies doing business in more than one such part (*b*). Although every branch is bound to contribute to a central fund, each must also have a separate fund of its own (*c*). In any litigation which concerns the central fund, the proper parties to sue are the trustees of the society in whom the fund is vested (*d*).

Separate funds.

Establishment of new branch.

251. Notice must be given to the registrar of the establishment and locality of a new branch. If the branch is to have separate officers or trustees authorised to sue and be sued on its behalf, their names must be furnished. A statement is also required whether or not the rules of the branch are identical with those of the other branches of the society, and, if not so, a copy of the rules of the branch must be sent (*e*).

Rules of new branch.

If the rules of a new branch are not identical with those of the other branches of the society, the society is not entitled, so far as that branch is concerned, to any of the privileges conferred by the Act of 1896 until the branch has been registered in the part of the United Kingdom in which the registered office of the branch is to be situated (*f*).

Registration of branch as separate society.

252. A registered branch cannot be registered as a separate society except on production to the registrar of a certificate (*g*), signed by the chief secretary or other principal officer of the parent society, that the branch body has wholly seceded or has been expelled (*h*).

Certificate of secession or expulsion.

The certificate cannot be withheld if the secession is duly carried out according to the rules of the society (*i*), but may be refused if, for example, the resolution to secede is invalid (*k*). An appeal lies to the High Court in case of refusal or omission to grant such certificate after three months from the receipt of a written request (*l*).

(*a*) See p. 132, *ante*.
(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 17 (2).
(*c*) *Ibid.*, s. 106 (definition of branch).
(*d*) *Crichton* v. *West* (1896), 12 T. L. R. 164.
(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 18 (1). Every notice of the establishment and application for registry of a branch must be made on a Treasury regulation form, signed by the secretary and three members of the branch and countersigned by the secretary of the society, Treasury Regulations, 1897 (10), Form Ab.
(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 18 (2).
(*g*) The certificate must be that contained in Treasury Regulations, 1897 (13), Form G; see Encyclopædia of Forms and Precedents, Vol VI., pp. 104, 105.
(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 20 (1).
(*i*) *Re Sheffield Order of Druids Society* (1892), 56 J. P. 613; *Green* v. *Hendry* (1890), *Times*, 19th May, *per* MATHEW, J.; see further, as to secession, p. 196, *post*.
(*k*) *Bolton District National Independent Order of Oddfellows* v. *National Independent Order of Oddfellows* (1896), Diprose and Gammon, 55.
(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 20 (2); *Green* v. *Hendry*, *supra*.

Part III.—Name and Chief Office.

SECT. 1.—*Name of Society.*

SECT. 1. Name of Society.

SUB-SECT. 1.—*Original Name.*

253. The name of the society must be set forth in the rules which are forwarded to the registrar for registration (*m*). On the acknowledgment of registry the society becomes a registered society under its registered name (*n*). The registrar will refuse registration if the name chosen for the society is identical with that in which any subsisting (*o*) society is already registered, or so nearly resembles that name as to be likely, or if for any other reason the name chosen is likely, to deceive members of the public as to the nature or identity of the society (*p*). Limitations on choice of name.

A society may not be registered in the same name as that of an existing unregistered society, or in any similar name, if calculated to injure the latter society (*q*). A society so registered might, it seems, be restrained from carrying on business under a name calculated to deceive (*r*).

Where two sections of an unregistered society claim registration under the same name, and the registrar is not satisfied as to the legal status of the applicants, he is justified in refusing registration until directed by mandamus to register (*s*).

A seceding or expelled branch may not use the name of the society from which it has seceded or been expelled, or any name implying that it still remains a branch (*t*).

The last words in the name of any collecting society registered since 31st December, 1895, must be "collecting society" (*a*). Name of collecting society.

SUB-SECT. 2.—*Change of Name.*

254. A registered society may change its name by special resolution (*b*), with the written approval of the registrar, and not Mode of changing name.

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 ; Sched. I. (1).

(*n*) *Ibid.*, s. 11.

(*o*) *I.e.*, subsisting at the date when application is made for registration ; see *Re Fourth South Melbourne Building Society* (1883), 9 Victorian Law Reports, Equity, 54.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 10.

(*q*) See *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638, C. A. (company registration) ; see also title COMPANIES, Vol. V., p. 84.

(*r*) See *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560 ; *Manchester Unity Independent Order of Oddfellows* v. *Canadian Order of Oddfellows* (1896), Diprose and Gammon, 397.

(*s*) *R.* v. *Friendly Societies (Registrar)* (1872), L. R. 7 Q. B. 741.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 21, 84 (d).

(*a*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 9.

(*b*) For form of special resolution for change of name of society, see Encyclopædia of Forms and Precedents, Vol. VI., p. 61. As to meaning of "special resolution," see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 74. Until a copy of the special resolution is registered, it has no effect (*ibid.*, s. 75). See further, as to special resolutions, p. 160, *post*.

SECT. 1. Name of Society.

otherwise (*c*). The choice of a new name on altera ion is subject to the same restrictions regarding identity or sim larity with the names of subsisting societies as the choice of a name on the formation of a new society (*d*).

Application.

An application to the registrar for approval of change of name must be accompanied by a statutory declaration (*e*) by an officer of the society that the statutory provisions with respect to special resolutions have been complied with (*f*).

Effect of change.

The change of name does not affect any right or obligation of the society or of any member. Pending legal proceedings may be continued by or against the trustees of the society or any other officer who may sue or be sued on behalf of the society, notwithstanding the change (*g*).

SECT. 2.—*Office of Society.*

Office.

255. Every registered society and branch must have a registered office to which all communications and notices may be addressed (*h*); and the place of the office of the society must be specified in the rules of a society (*i*). The registered place of business of a branch shall be deemed to be its registered office until notice of change has been duly sent (*k*).

Change of office.

256. The place of the office may be changed in manner provided by the rules. Notice of every such change must be sent to the registrar within fourteen days after the change (*l*). Notice of change of a branch office must be sent to the registrar through the officer appointed for that purpose by the central body (*m*).

Societies established before 1st January, 1876.

257. The place of business of a society enrolled or certified before 1st January, 1876, as stated in the rules, or in any notice of change duly sent to the registrar, is deemed the registered office of the society until proper notice is received by the registrar (*n*).

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 69 (1).
(*d*) See *ibid.*, s. 10, and p. 135, *ante*.
(*e*) Treasury Regulations, 1897 (33). For form of application, see Treasury Regulations, 1897, Form T; for form of statutory declaration, see *ibid.*, Form U; and see Encyclopædia of Forms and Precedents, Vol. VI., p. 62.
(*f*) Treasury Regulations, 1897 (33). As to special resolutions see p. 160, *post*. The fee for registration of a special resolution is 10s.; this includes the approval of the name (Treasury Regulations, 1897 (70)).
(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 69 (2).
(*h*) *Ibid.*, s. 24 (1). This constitutes notice of the situation of the office (Treasury Regulations, 1897 (14)).
(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (1).
(*k*) Treasury Regulations, 1897 (15).
(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 24 (1); Treasury Regulations, 1897 (14); Forms H and H b. There is no fee for registry of notice of change of office, but failure to have a registered office or to notify a change is an offence under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84.
(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 24 (2).
(*n*) Treasury Regulations, 1897 (15).

Part IV.—Rules.

SECT. 1.—*In General.*

SECT. 1. In General.

Rules contain contract between society and members.

258. The contract between a society, whether registered or not, and its members is to be found in the rules (*o*) for the time being in force (*p*), having regard to any alterations duly made (*q*). But a society may be estopped by its conduct from enforcing the contract contained in the rules (*r*). In case of a conflict between the rules of a society and of a branch, the former prevail (*s*).

Rules of societies other than friendly societies.

The rules of a registered cattle insurance society (*t*) or branch, and of such specially authorised societies or branches as the Treasury may determine, bind the society, its branches, and members, and all persons claiming through them, including nominees where nomination is allowed (*u*), to the same extent as if each member had signed and sealed and covenanted to observe them, subject to the provisions of the Act of 1896 (*a*).

Copies of rules.

259. Societies and branches registered under the Act of 1896 must supply a copy of their rules to any person requiring it, at a charge not exceeding 1*s.* a copy (*b*). Collecting societies must deliver to every member or insurer a copy of their rules, with a printed policy signed by two of the committee (*c*) and the secretary, and not more than 1*d.* each may be charged for the rules and policy (*d*). In the case of a family enrolled in one book or card one copy of rules and one family policy are sufficient (*e*).

No power to contract in violation of rules.

260. A rule which gives a general power to the committee "to settle and determine any other matter or thing relating to the society" does not authorise the committee to enter into a contract in violation of the other rules of the society (*f*).

(*o*) As to registration of rules, see pp. 130, 131, *ante*.

(*p*) See *Souter* v. *Davies* (1865), 15 R. 261 (registered society); *Harris* v. *United Kingdom Postal and Telegraph Service Benevolent Society* (1889), 87 L. T. Jo. 272; *Ashby* v. *Costin* (1888), 21 Q. B. D. 401 (unregistered societies); and the cases on alterations of rules, pp. 139, 140, *post;* see also title BUILDING SOCIETIES, Vol. III., p. 331. As to the power of a society to construe its own rules, see *Thorburn* v. *Barnes* (1867), L. R. 2 C. P. 384, 403. As to rules which are *ultra vires*, see *Catt* v. *Wood*, [1910] A. C. 404.

(*q*) As to what alterations are binding, see p. 140, *post*.

(*r*) *Page* v. *Thomas* (1892), Diprose and Gammon, 215, where a society, after discovering a misstatement as to the health of a member which would have enabled it to refuse to give sick pay, continued to receive subscriptions from such member. As to estoppel by conduct, see title ESTOPPEL, Vol. XIII., p. 377.

(*s*) *Loach* v. *Coley* (1907), 122 L. T. Jo. 463.

(*t*) As to cattle insurance societies, see p. 125, *ante*.

(*u*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106.

(*a*) *Ibid.*, s. 31 (1); compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14, and cases thereunder; see title COMPANIES, Vol. V., p. 80.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 38. As to offences in regard to supplying copies of rules, see *ibid.*, ss. 84, 87 (1).

(*c*) For definition of "committee," see *ibid.*, s. 106.

(*d*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 2 (1); as to form of policy, see title INSURANCE.

(*e*) *Ibid.*, s. 2 (2); see Treasury Regulations, 1897 (74).

(*f*) *Tyrrell* v. *Woolley* (1840), 1 Man. & G. 809; *Garner* v. *Shelley* (1829), 5 Bing. 477; see *Tillotson* v. *Liverpool Victoria Legal Friendly Society* (1907), 124 L. T. Jo. 241.

SECT. 1. In General.

Illegal rules. Injunction.

261. Rules which are illegal may prevent a society, some of the rules of which are substantially those of a friendly society, from availing itself of the advantages of registration as a friendly society (*g*).

Dealings with the funds of a society in accordance with improvident rules may be restrained by injunction (*h*).

Rules of societies established prior to 1897.

262. The rules of societies and branches registered, enrolled, or certified under former Acts are valid where not contrary to any express provision of the Act of 1896, but alteration or rescission of the rules must be effected according to that Act (*i*).

SECT. 2.—*Contents of Rules.*

Rules under Friendly Societies Act, 1896.

263. The rules sent to the registrar with the application for registry of a society must comply with the statutory provisions according to the class in which the society is to be registered (*j*).

Contents.

Thus the rules of a society registered under the Act of 1896 (*k*) must set forth the name, place of office, and objects (*l*) of the society; the purposes for which the funds are to be applicable; the terms of admission of members; the conditions under which a member is entitled to a benefit; the fines (*m*) and forfeitures to be imposed on any member; the consequences of non-payment of any subscription or fine (*n*); and must provide for the mode of holding meetings and right of voting, and the manner of making, altering, and rescinding rules; the manner of appointing and removing a committee of management (by whatever name), a treasurer, and other officers and trustees, and, in the case of a society with branches, the composition and powers of the central body, and the conditions under which a branch may secede from the society; for the investment of funds, keeping accounts, and an audit at least once a year; annual returns to the registrar of the receipts, funds, effects, and expenditure, and number of members of the society; the inspection of the books of the society by every person having an interest in the funds of the society; the manner in which disputes are to be settled; a provision, in the case of a dividing society,

(*g*) *Old* v. *Robson* (1890), 59 L. J. (M. C.) 41; see *Hornby* v. *Close* (1867), L. R. 2 Q. B. 153; *Farrer* v. *Close* (1869), L. R. 4 Q. B. 602; *Duke* v. *Littleboy* (1880), 49 L. J. (CH.) 802, where rules were held to be illegal as in restraint of trade; see also title TRADE AND TRADE UNIONS.

(*h*) *Reeve* v. *Parkins* (1820), 2 Jac. & W. 390, where a society was paying annuities in accordance with rules founded on erroneous principles; see *Pearce* v. *Piper* (1809), 17 Ves. 1. As to procedure to obtain injunction, see title INJUNCTION.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 101 (1).

(*j*) *Ibid.*, s. 9 (3). Model rules, the use of which is optional, are obtainable from the Central Office. For forms of rules, see Encyclopædia of Forms and Precedents, Vol. VI., p. 27 (rules of a friendly society), p. 41 (branch), p. 45 (benevolent society), p. 52 (working men's club), p. 54 (specially authorised society). See, further, as to rules and their amendment, p. 139, *post*. As to classes in which societies may be registered, see p. 123, *ante;* and as to the status of an unregistered society, see pp. 127, 129, *ante*.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. For forms of rules, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 27—55.

(*l*) As to what those objects may be, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8; and p. 124, *ante*.

(*m*) An express power to fine in a specified instance, given by a rule, negatived a power to fine in other cases (*Loach* v. *Coley* (1907), 122 L. T. Jo. 463).

(*n*) *E.g.*, Suspension or expulsion, see *Catt* v. *Wood*, [1910] A. C. 404, 406.

SECT. 2. Contents of Rules.

for meeting all claims upon the society existing at the time of division before any such division takes place; provisions in the case of friendly and cattle insurance societies for keeping separate accounts of all moneys received or paid on account of every particular fund or benefit assured for which a separate table of contributions payable shall have been adopted, and for keeping separate accounts of the expenses of management, and of all contributions on account thereof; a provision for valuation once at least in every five years of the assets and liabilities of the society, including the estimated risks and contributions (except in the case of cattle insurance societies); provisions for the voluntary dissolution of the society by consent, in a friendly society, of not less than five-sixths in value of the members, and of every person for the time being entitled to any benefit from the funds of the society unless his claim be first satisfied or adequately provided for, and, in a cattle insurance society, by consent of three-fourths in number of the members; and provisions authorising one-fifth of the total number of members, or 100 members in the case of a society of 1,000 members and not exceeding 10,000, or 500 members in the case of a society of more than 10,000 members, to apply to the Chief Registrar for an investigation of the affairs of, or for winding up, the society (*o*).

If the society intends to avail itself of the statutory powers enabling it to hold land (*p*), make loans to members (*q*), accumulate surplus of contributions for members' use (*r*), insist on security being given by officers (*s*), or charge money for recording nominations (*t*), these matters must be provided for in the rules (*a*).

Rules of collecting society.

264. The rules of a collecting society must, unless it has been exempted, embody certain statutory provisions, including regulations for delivery of copies of rules, for giving members notice before forfeiture, restricting transfers without consent, for the holding of general meetings, for the inspection and delivery of balance sheets and annual returns, the settlement of disputes, the disabilities of collectors, and as to the name of the society (*b*).

SECT. 3.—*Alteration of Rules.*

Power to alter rules.

265. A society on its formation can, and usually does, provide for the alteration of its rules (*c*), and no society may now be

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I.
(*p*) *Ibid.*, s. 47.
(*q*) *Ibid.*, s. 46.
(*r*) *Ibid.*, s. 42.
(*s*) *Ibid.*, s. 54.
(*t*) Treasury Regulations, 1897 (25).
(*a*) Treasury Regulations, 1897 (3), Form A, note.
(*b*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 10; see *ibid.*, ss. 1—9. These provisions are referred to on pp. 135, 137, *ante*, and pp. 146, 150, 157, 158, 174, 175, 178, 182, *post*, respectively. As to exemptions, see p. 128, *ante*.
(*c*) The usual provision is that new rules, amendments, alterations etc. can only be made with the consent of a majority of the members present at a general meeting specially called for that purpose; see Encyclopædia of Forms and Precedents, Vol. VI., pp. 31, 47. For form of notice of general meeting

SECT. 3. **Alteration of Rules.**

registered the rules of which do not contain such provision (*d*). If the rules of an unregistered society make no provision for alteration, they cannot be altered except by consent of all the members, for there is no express or implied power under statute to alter rules (*e*); but alterations in the rules of a registered society, if made in accordance with the rules and duly registered (*f*), are binding upon members, including persons who joined the society before such alterations were made, and have not assented to the alteration (*g*), and upon sureties (*h*).

Where consent of all members necessary.

Consequences of alteration.

Power to alter rules does not enable a society to repudiate liability to pay an existing debt to a member, where the right to be paid has already vested, unless the member has contracted that he will be bound by the rules in force for the time being (*i*). Where a member has contracted to be bound by any future amendment of rules, he may be excluded by such amendment from receiving further benefits which would have been payable to him if the rule had not been amended (*j*).

Alteration of rules under repealed Act.

A society established prior to an Act (*k*) which gave power to all existing registered friendly societies to alter rules cannot, after the repeal of the Act and where the rules themselves contain no such power, alter its rules to a member's disadvantage (*l*). The repeal of an Act does not invalidate rules made under its provisions (*m*).

Registry of amendments.

266. Until registered, an amendment of a rule made by a registered society (*n*) or branch (*o*) is not valid.

for the purpose of amending rules and for forms of various resolutions effecting such amendments, see Encyclopædia of Forms and Precedents, Vol. VI., p. 56.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (3).

(*e*) *Souter* v. *Davies* (1895), 15 R. 261; *Powell* v. *Tokeley* (1906), Report of Chief Registrar, 134. The stat. (1855) 18 & 19 Vict. c. 63, s. 27 (which gave power to alter rules), was repealed in 1875; see title CLUBS, Vol. IV., p. 142.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 13 (1).

(*g*) *Smith* v. *Galloway*, [1898] 1 Q. B. 71; *Caundle* v. *Bingham* (1879), Diprose and Gammon, 537; *Davis* v. *Bird* (1881), Diprose and Gammon, 537; *Prince of Wales Lodge, Independent Order of Oddfellows, Kingston Unity* v. *Shields District Independent Order of Oddfellows, Kingston Unity (Officers)* (1883), Diprose and Gammon, 538; *Gutberlet* v. *Woolgar* (1898), Report of Chief Registrar, p. 32; see, further, title TRADE AND TRADE UNIONS.

(*h*) *Birmingham and Midland Money Society, Ltd.* v. *King* (1907), 124 L. T. Jo. 181.

(*i*) *Souter* v. *Davies, supra; Smith* v. *Galloway, supra.*

(*j*) *Stooke* v. *Mutual Providence Alliance* (1891), Diprose and Gammon, 195; *Smith* v. *Galloway, supra;* compare *R.* v. *Brabrook* (1893), 69 L. T. 718 (building society case); *Dixon* v. *Thompson* (1891), Diprose and Gammon, 46.

(*k*) Stat. (1855) 18 & 19 Vict. c. 63, s. 27; repealed by Friendly Societies Act, 1875 (38 & 39 Vict. c. 60).

(*l*) *Souter* v. *Davies, supra.*

(*m*) *Smith* v. *Galloway, supra*, where a member joined a society on the basis that the rules might be altered, and became entitled to a benefit, the subsequent alteration of a rule, whereby his security was diminished, was held valid. As to the effect of repeal of statutes, generally, see title STATUTES.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 13 (1). There is nothing in this section or in the rest of the Act to render the registration of an amendment of rules compulsory. An unregistered amendment is simply unenforceable. The application for registration of an amendment must be made in the authorised form and be accompanied by a statutory declaration, a printed copy of the existing rules, and two copies of the new rules (*ibid.*); Treasury Regulations, 1897 (6), (7)). The registrar may require fair printed copies of amendments for registration (*ibid.* (7)).

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 19.

In the case of a registered society, an appointment of new trustees in accordance with new and unregistered (*p*) rules is inoperative (*q*).

Where invalid (*r*) or unregistered (*s*) alterations in rules have been made the old rules remain in force, even though in practice abandoned.

Partial amendment of rules.

An alteration of rules may be either partial (*t*) or complete (*a*). The registrar has a discretionary power to refuse to register a partial amendment of rules and to require a complete amendment (*b*). An appeal to the High Court lies from a refusal to register an amendment of a rule (*c*).

Acknowledgment of registry of amendment.

267. The registrar must issue to the society an acknowledgment of registry of an amended rule, or branch rule, on being satisfied that the amendment is not contrary to the provisions of the Act of 1896 (*d*). The acknowledgment by the registrar is conclusive evidence of due registration (*e*), and is also conclusive that the necessary preliminary steps have been taken to make the alteration

(*p*) Rules were not valid under the former Acts until confirmed by justices (stat. (1793) 33 Geo. 3, c. 54), s. 3; stat. (1829) 10 Geo. 4, c. 56, s. 7); or certified by the registrar (stat. (1855) 18 & 19 Vict. c. 63, s. 27); see *Dewhurst* v. *Clarkson* (1854), 3 E. & B. 194.

(*q*) *Battey* v. *Townrow* (1814), 4 Camp. 5.

(*r*) *R.* v. *Cotton* (1850), 15 Q. B. 569 (alterations by consent, without statutory formalities, and not enrolled).

(*s*) *Re Meredith and Whittingham* (1856), 1 C. B. (N. S.) 216; but see *R.* v. *Godolphin (Lord)* (1838), 8 Ad. & El. 338, where it was considered doubtful whether old rules abandoned for thirty years were still enforceable, and *Ex parte Norrish* (1821), Jac. 162, where a society which no longer acted upon its registered rules was held to be dissolved.

(*t*) Treasury Regulations, 1897 (5) (a). For forms of application to register a partial amendment and of accompanying declaration, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 57, 59. These forms, which are statutory (Treasury Regulations, 1897, Forms B and C), must be accompanied by a printed copy of the existing rules, marked to show where the alterations occur and what they are, and by copies of the new or amended rules signed by three members and the secretary (Treasury Regulations, 1897 (6) (a), (b)).

(*a*) Treasury Regulations, 1897 (5) (b). For forms of application to register a complete amendment and of accompanying statutory declaration, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 58, 59. These forms must be accompanied by a printed copy of the existing rules and copies of the new rules, signed by three members and the secretary (Treasury Regulations, 1897 (7)). An application to register an amendment of branch rules must be made in Form Bb or in Form Db (Treasury Regulations, 1897 (11)), as the case may require, and may be made by an officer of the society, in which case the statutory declaration in support thereof (From Cb) must be made by the secretary of the branch; or the application must be made by the secretary of the branch, in which case the statutory declaration (Form Cb) must be made by an officer of the society. Instead of a statutory declaration in Form Cb, the Chief Registrar or other registrar may require and receive information in Form CbI (Treasury Regulations, 1897 (75)).

(*b*) Treasury Regulations, 1897 (7).

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 12 (1), 13 (3); and see *R.* v. *Brabrook* (1893), 69 L. T. 718. The proper remedy seems to be by mandamus. As to mandamus, generally, see title CROWN PRACTICE, Vol. X., p. 77.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 13 (2), 19; *R.* v. *Brabrook, supra; secus*, where the alterations are illegal (*R.* v. *Tidd Pratt* (1865), 6 B. & S. 672).

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 13 (2). For forms of acknowledgment of registry of amendment of rules or branch rules, see *ibid.*, Sched. II., Part I.

SECT. 3. Alteration of Rules.

binding on the society and members (*f*); but the fact that amended rules have been registered is not conclusive of their legality or validity (*g*). The duty of the registrar is merely to consider whether the rules or amendments of rules presented for registration are in conformity with the Act (*h*).

Cancelling registry.

268. Where proceedings are taken for cancelling (*i*) registry, no application or declaration is required for any amendment of rules which may become necessary in connection therewith (*k*).

Part V.—Officers.

SECT. 1.—*In General.*

Necessary and usual officers.

269. The business of a registered society or branch is managed through its officers (*l*), who must, in order properly to comply with the Act of 1896, include one or more trustees (*m*), a secretary (*n*), a treasurer (*o*), and a committee of management (*p*). Other officers commonly appointed include auditors (*q*), managers (*r*), persons to sue or be sued on behalf of a society or branch (*s*), and medical officers, who must be registered under the Medical Act (*t*).

Infants and corporations.

Infants cannot be members of the committee, trustees, managers, or treasurers (*a*), and it is doubtful whether a corporation can be an officer (*b*).

A collector (*c*) of a collecting society is incapable of holding any

(*f*) *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. 373, C. A.; *Butler* v. *Springmount Dairy Society*, [1906] 2 I. R. 193, C. A., neither of which cases concerned friendly societies, but the same principle applies; see also title BUILDING SOCIETIES, Vol. III., p. 333, and cases there cited.

(*g*) *Davie* v. *Colinton Friendly Society* (1870), 9 Macph. (Ct. of Sess.) 96; *Souter* v. *Davies* (1895), 15 R. 261; compare *Laing* v. *Reed* (1869), 5 Ch. App. 4; *Osborne* v. *Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; [1910] A. C. 87.

(*h*) See *R.* v. *Brabrook* (1893), 69 L. T. 718.

(*i*) Under Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 73. As to cancellation, see p. 203, *post*.

(*k*) Treasury Regulations, 1897 (6), note.

(*l*) The expression "officer" in the Act of 1896 includes a trustee, treasurer, secretary, member of the committee of management, and a person appointed to sue or be sued on behalf of a society or branch; see *ibid.*, s. 106; see, also, title COMPANIES, Vol. V., pp. 242, 478.

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (1); and see p. 144, *post*.

(*n*) *Ibid.*, s. 9 (2); and see p. 145, *post*.

(*o*) *Ibid.*, Sched. I. (4); and see p. 146, *post*.

(*p*) *Ibid.* See also definition of "officer," s. 106.

(*q*) *Ibid.*, s. 26; and see p. 146, *post*.

(*r*) *Ibid.*, s. 36 (2); and see p. 146, *post*.

(*s*) *Ibid.*, Sched. I. (4).

(*t*) (1858), 21 & 22 Vict. c. 90, s. 36. As to registered medical practitioners, see title MEDICINE AND PHARMACY; as to the right of a society to sue its former medical officer for breach of a covenant not to practice in the neighbourhood, see *Everton* v. *Longmore* (1899), 15 T. L. R. 356, C. A.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 36 (2).

(*b*) *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (1879), 11 Ch. D. 768, where it was held that an incorporated banking company could not hold the office of treasurer; see, further, title CORPORATIONS, Vol. VIII., p. 358.

(*c*) For interpretation of expression "collector," see Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 17 (1), and

office therein, except that of superintending collector within a specified area (*d*).

Appointment of officers.

270. The rules of a registered society must provide for the appointment of a committee of management (by whatever name), a treasurer, trustees, and other officers (*e*). A list signed by the secretary and every trustee and other officer named in it is evidence, on registry of the society, that the named persons have been duly appointed (*f*).

Security of officers.

271. Every officer of a registered society or branch having the receipt or charge of money (*g*) must, if the rules so require, give either a bond, with at least one surety (*h*), or the security of a guarantee society (*i*), to secure the rendering of accounts by, and the payment of all sums due from, him (*j*). Omission to obtain a bond is fatal to the society's claim to payment in priority to other creditors on the bankruptcy of an officer (*k*).

Accounts of officers.

272. Every officer of a registered society or branch having the receipt or charge of money must, at the times provided by the rules, or upon demand or notice in writing, render an account or pay over the moneys and deliver the property of the society in his hands (*l*). In the event of default, the trustees or authorised officers of the society or branch may sue on the bond or security given by the officer, or apply to the county court (*m*) or court of summary

p. 128, *ante*. See also *Joyce* v. *Northumberland Miners' Friendly Society* (1888), 4 T. L. R. 525 (cashier a collector).

(*d*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 8 (b); it is an offence under the Act if he holds office (*ibid.*, s. 14 (1) (a)).

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (4). See Encyclopædia of Forms and Precedents, Vol. VI., p. 31. As to rules authorising a collector on dismissal or resignation to nominate a successor, see *Finlay* v. *Royal Liver Friendly Society* (1901), 39 Sc. L. R. 23; *Batty* v. *Scottish Legal Life Assurance Society* (1902), 39 Sc. L. R. 747.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (4). It is conceived that such evidence is rebuttable. As to rebuttal of evidence generally, see title EVIDENCE, Vol. XIII., p. 435.

(*g*) The expression "officer in receipt or charge of money" does not include a society's banker (*Re Rufford and Wragge, Ex parte Orford* (1852), 1 De G. M. & G. 483; *Re Wise, Ex parte Whipham* (1844), 3 Mont. D. & De G. 564), or clerk (*Re Thick, Ex parte Brickland* (1818), Buck, 214); but it may include a collector (see *Ellwood* v. *Liverpool Victoria Legal Friendly Society* (1880), 42 L. T. 694, where the question was whether the collecting books belonged to the collector or to the society).

(*h*) As to the liability of such sureties, see *Madden* v. *M'Mullen* (1860), 13 I. C. L. R. 305.

(*i*) Societies for guaranteeing the performance of their duties by officers of friendly societies are among those specially authorised by the Treasury (special authority, 31st January, 1878), see p. 125, *ante*. The society may itself guarantee its officers (Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 1). As to how a guarantee policy is construed, see *Fifth Liverpool Starr-Bowkett Building Society* v. *Travellers Accident Insurance Co.* (1893), 9 T. L. R. 221.

(*j*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 54; *R.* v. *Dorizzi* (1897), Diprose and Gammon, 578 (police court conviction for failure to give security). For form of bond, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 98 (4); *ibid.*, Sched. II., Part III.; Encyclopædia of Forms and Precedents, Vol. VI., p. 78; and generally, as to such security, title GUARANTEE, pp. 437 *et seq.*, *post*.

(*k*) *John O'Gaunt Lodge of Oddfellows* v. *Bell* (1883), Diprose and Gammon, 67 (county court); see *Ex parte Ross* (1802), 6 Ves. 802; *Re Clarke, Ex parte Haynes* (1844), 3 Mont. D. & De G. 663. As to priority, see p. 162, *post*.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 55 (1).

(*m*) In the county court such an application must be by action, commenced

SECT. 1. In General.

jurisdiction, the order of either court being final and conclusive (*n*). The jurisdiction of the High Court also is not excluded (*o*).

Removal or dismissal of officers.

273. The rules of a registered society must provide for the removal of officers (*p*). An officer dismissed by resolution of a general meeting of a society cannot be reinstated by mandamus (*q*). A secretary of a friendly society, on receiving notice from a competent court of his removal from office, may not part with the books in his custody as office-holder except to the official to whom he is directed to deliver them (*r*). Nor may an officer of a collecting society after dismissal give a list of the members to a rival society (*s*).

SECT. 2.—*Trustees.*

Trustees. Appointment and removal.

274. Every registered society and every registered branch must have one or more trustees (*t*), and their appointment and removal must be provided for in the rules (*a*). Such trustees must be appointed by a resolution of a majority of the members present at a general meeting of the society or branch and entitled by the rules to vote (*b*).

Notice to registrar.

A copy of the resolution, signed by the trustee and the secretary, must be sent to the registrar within fourteen days (*c*). In the case of a branch, the copy of the resolution must be sent through an officer appointed by the central body (*d*). Failure to give notice is a statutory offence (*e*), but does not, it seems, invalidate the appointment (*f*).

Persons ineligible.

Neither the secretary nor treasurer of a registered society or branch can be a trustee (*g*).

Duties of trustees.

275. Unless the rules otherwise provide, the trustees of a registered society or branch are the proper persons to sue or be

by plaint and summons in the ordinary way (County Court Rules, 1903, Ord. 41, rr. 4—10; and see title COUNTY COURTS, Vol. VIII., p. 651; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 86).

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 55 (2). See *First Edinburgh and Leith 415th Starr-Bowkett Building Society* v. *Munro* (1883), 11 R. (Ct. of Sess.) 5. An officer of a friendly society, entrusted with moneys of the society jointly with a non-officer member, is probably not within the above summary remedy (*Re Heanor Friendly Society* (1838), 1 Beav. 508, a case decided on stat. (1793) 33 Geo. 3, c. 54, s. 8).

(*o*) See *Re Royal Liver Friendly Society* (1887), 35 Ch. D. 332. As to when costs will only be given on the county court scale in a High Court action by a society against a treasurer and his surety, see *Duxbury* v. *Barlow*, [1901] 2 K. B. 23, C. A.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3), Sched. I. (4). See *Tillotson* v. *Liverpool Victoria Legal Friendly Society* (1907), 124 L. T. Jo. 241.

(*q*) *Evans* v. *Heart of Oak Benefit Society* (1866), 12 JUR. (N. S.) 163; *contra*, *R.* v. *Hearts of Oak Benefit Society* (*Trustees*) (1865), 13 W. R. 724. As to mandamus, generally, see title CROWN PRACTICE, Vol. X., p. 77.

(*r*) *Glasgow District of Ancient Order of Foresters* v. *Stevenson* (1899), 2 F. (Ct. of Sess.) 14.

(*s*) *Liverpool Victoria Legal Friendly Society* v. *Houston* (1900), 3 F. (Ct. of Sess.) 42.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (1).

(*a*) *Ibid.*, s. 9 (3), Sched. I. (4). See, *e.g.*, Encyclopædia of Forms and Precedents, Vol. VI, pp. 32, 47.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (2).

(*c*) *Ibid.*, s. 25 (3); Treasury Regulations, 1897 (16), Forms I and Ib. There is no fee for registry.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (5).

(*e*) *Ibid.*, s. 84.

(*f*) See *Beckett* v. *Willetts* (1857), 5 W. R. 622.

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (4).

sued (*h*), and they are liable to be sued for debts incurred by the society before their appointment (*i*). Though the trustees are nominal plaintiffs, the society is the real litigant, and therefore the board of management of the society is entitled to direct any change of solicitors (*k*).

Other duties.

Other duties of the trustees are to invest the funds of the society (*l*), hold any land (*m*) or other property (*n*) belonging to the society, give receipts for money secured by mortgage (*o*), distribute money payable on death of a member intestate (*p*), and apply for an order for amalgamation or transfer (*q*).

Liability of trustees.

276. The trustees of a registered society or branch are personally liable for moneys actually received by them on account of the society or branch, but not for any other deficiency that may occur in the funds (*r*). They are liable also for moneys paid away or divided by them in accordance with a resolution of the society passed contrary to a rule (*s*). But trustees who have signed cheques, acting ministerially and under the direction of the committee of management, are not personally responsible for loss incurred through the misapplication by the committee of the moneys so obtained (*a*). Where trustees, who have been restrained by injunction from dividing certain funds of a society, retire, and new trustees are appointed, and are aware of the injunction, the latter are liable to attachment for contempt of court if they make the forbidden division (*b*).

SECT. 3.—*Secretary and other Officers.*

Appointment of secretary.

277. The rules of a registered society should provide for the appointment and removal of a secretary (*c*). A secretary is an officer (*d*), but he cannot be a trustee (*e*).

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94 (1). Where a society or branch appoints other officers for this purpose, notice of every such appointment must be given in the same manner as provided for trustees, with the necessary modifications to suit the facts (Treasury Regulations, 1897 (69)).

(*i*) *Beckett* v. *Willetts* (1857), 5 W. R. 622.

(*k*) *Laskey* v. *Runtz* (1908), 24 T. L. R. 496.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 44; see p. 167, *post*.

(*m*) *Ibid.*, ss. 47, 48; see p. 169, *post*.

(*n*) *Ibid.*, s. 49; see p. 169, *post*.

(*o*) *Ibid.*, s. 53; see p. 166, *post*.

(*p*) *Ibid.*, s. 58; see p. 154, *post*.

(*q*) *Ibid.*, s. 70 (4); see p. 192, *post*.

(*r*) *Ibid.*, s. 49 (3). See *Bute's* (*Marquis*) *Case*, [1892] 2 Ch. 100, 108.

(*s*) *Cox* v. *James* (1882), Diprose and Gammon, 282; *Holmes* v. *Taylor* (1889), Diprose and Gammon, 285; *Scott* v. *Evans* (1895), Diprose and Gammon, 560. For refunding, see p. 157, *post*.

(*a*) *Grimes* v. *Harrison* (1859), 26 Beav. 435. In this case the committee were ordered to replace the money, and the trustees, though they had only acted ministerially, were refused their costs.

(*b*) *Avery* v. *Andrews* (1882), 51 L. J. (CH.) 414; see also title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 292.

(*c*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 31.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106.

(*e*) *Ibid.*, s. 25 (4).

SECT. 3. **Secretary and other Officers.**

Duties of secretary.

Among other duties (*f*), a secretary of a registered society, or of a society intending to be registered, must sign an application to register the society (*g*), copies of any amendment of rules sent to the registrar (*h*), notice of the establishment and application for registry of a branch (*i*), a certificate of secession of a branch (*k*), an application to transfer stock (*l*), a receipt discharging a mortgage (*m*), and a copy of a special resolution for registry (*n*).

Auditors.

278. The rules of a registered society or branch usually provide for the appointment of two or more auditors (*o*), whose duty it is to examine and verify the annual return (*p*). If the rules do not provide for the appointment of auditors, the accounts of a registered society must be audited by a public auditor (*q*).

Treasurer.

279. The rules of a registered society must provide for the appointment and removal of a treasurer (*r*). Trustees are ineligible for this office (*a*).

The responsibility of a treasurer for moneys belonging to a society which he has received is that of a bailee, so that if, before paying them into the bank, he is robbed by *vis major*, his guarantor would, it seems, not be liable (*b*).

Committee of management.

280. The rules of a registered society must provide for the appointment and removal of a committee of management (*c*). A member of such committee is an officer (*d*). No collector of a collecting society may be a member (*e*). The duties of a committee of management are, *inter alia*, to manage the society (*f*), and to

(*f*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 33.
(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (2).
(*h*) *Ibid.*, s. 13 (1).
(*i*) *Ibid.*, s. 18 (1).
(*k*) *Ibid.*, s. 20 (1).
(*l*) *Ibid.*, s. 34 (1).
(*m*) *Ibid.*, s. 53 (1).
(*n*) *Ibid.*, s. 75.
(*o*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 31; and p. 173, *post*.
(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 26. As to duties of auditors, see title COMPANIES, Vol. V., p. 269.
(*q*) *Ibid.*, ss. 26, 30; see also p. 173, *post*. As to the jurisdiction of the court where proper auditors have not been appointed, see *Shaw* v. *Vindicator Lodge of Druids* (1906), Report of Chief Registrar, 132.
(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3), Sched. I. (4); see *Roberts* v. *Price* (1847), 4 C. B. 231 (case of a void election). For form of rules providing for appointment and removal of a treasurer, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 31, 47. As to the duties of a treasurer, see *ibid.*, pp. 32, 33. As to officers in receipt or charge of money, see, further, p. 145, *ante*.
(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (4). As to infants and corporations, see p. 142, *ante*.
(*b*) *Walker* v. *British Guarantee Association* (1852), 18 Q. B. 277; see title BAILMENT, Vol. I., p. 531.
(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3), Sched. I. (4); and see Encyclopædia of Forms and Precedents, Vol. VI., p. 31.
(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106.
(*e*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 8 (a). As to infants, see p. 142, *ante*.
(*f*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 32.

prosecute for fraud or misappropriation (*g*), and their consent to investments is necessary (*h*).

Part VI.—Membership.

SECT. 1.—*Who may be Members.*

Members.

281. No maximum limit is imposed by law on the number of members of a friendly society (*i*); nor are there any statutory conditions regulating the admission of members, except as regards age. Such matters are properly dealt with in the rules of the society (*j*). Honorary members are admissible, but not corporations (*k*).

Infants.

282. The membership of infants is a matter to be provided for in the rules, and a rule may be made that a person may be admitted as a member from birth (*l*). If the rules of a registered friendly society or branch, in force on 1st January, 1909, provide for the admission as members of persons above one year old, the rules are to be construed as providing for the admission of persons from birth (*m*). An infant member, if over sixteen years of age, may execute all necessary instruments and give all necessary acquittances under the rules. If under that age, he must do these things by his parent or guardian (*n*).

Married women.

283. A married woman may be a member of a friendly society (*o*), and, until the contrary is shown, her interest in the society is to be regarded as her separate property, except where shares stand in her name jointly with that of her husband (*p*).

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (4). As to offences by a committee of management, see *ibid.*, s. 85, and p. 184, *post*.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 44.

(*i*) As to the minimum number of members of a registered society, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (1); and pp. 126, 131, *ante*.

(*j*) *Ibid.*, Sched. I. (2). See, *e.g.*, Encyclopædia of Forms and Precedents, Vol. VI., p. 28.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 78 (c); and see title BUILDING SOCIETIES, VOL. III., p. 350.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 36 (1); Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 2 (1). As to infants being ineligible as officers, see p. 142, *ante*.

(*m*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 2 (2).

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 36 (2). As to powers of infant members of building societies, see title BUILDING SOCIETIES, Vol. III., p. 350, and as to capacity of infants, generally, see title INFANTS AND CHILDREN. It has been held in Scotland that an infant who, under the articles of association of an unregistered society, is ineligible for membership, but accepts membership and acts as a member, is liable to the payment of dues incurred by him prior to the date of his resignation (*Aberdeen Master Masons' Incorporation, Ltd.* v. *Smith*, [1908] S. C. 669).

(*o*) See Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (1) (a), (b), where reference is made to the husbands of members.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6—9. As to investments with husband's money, see *ibid.*, s. 10; and as to deciding questions of title between husband and wife, see *ibid.*, s. 17; and generally, as to wife's separate property, title HUSBAND AND WIFE.

SECT. 2. SECT. 2.—*Rights of Members.*

Rights of Members.

Rights of members.

284. Members of registered societies and branches are entitled to a copy of the rules for a sum not exceeding 1*s.* (*q*). They are also entitled, without payment, to a copy of the last annual return and of the audited balance sheet (*r*), and to inspect the books (*s*). A member may retire at any time (*t*).

Limitation of benefits.

285. A member, or person claiming through a member (*a*), of a registered friendly society or branch is never entitled to receive more than £300 by way of gross sum, together with any bonuses or additions declared upon assurances not exceeding that amount (*b*), nor, except in the case of societies established before 15th August, 1850 (*c*), more than £52 by way of annuity from any one or more of such societies or branches (*d*), and the claimant may be required to make a statutory declaration that the total amount to which he is entitled does not exceed such sums (*e*). But this rule does not apply where a scheme certified under the Workmen's Compensation Acts provides for payment of compensation by a friendly society (*f*).

Deposits.

286. The rules of a registered society or branch may provide for accumulating at interest for a member's use any surplus of his contributions to the funds of the society or branch which may remain after providing for the assurance for which they are paid, and for the withdrawal of the accumulations (*g*). Moneys due to a member of a friendly society and payable subject to notice of withdrawal cannot be attached by garnishee proceedings in the county court to satisfy a judgment against such member (*h*).

Right to pension.

287. Where a member of an unregistered friendly society, who has been obliged to resign, is qualified for a pension under the rules, and his right to such pension is, under the rules, to be determined by a majority of the directors, the directors cannot delegate their judicial functions to a committee (*i*).

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 38.

(*r*) *Ibid.*, s. 39.

(*s*) *Ibid.*, s. 40; see also p. 174, *post*. As to penalties if these rights are denied, see note (*h*), p. 175, and p. 184, *post*. As to inspection, generally, see title COMPANIES, Vol. V., p. 365, note (*a*).

(*t*) *Finch* v. *Oake*, [1896] 1 Ch. 409, C. A.

(*a*) A person claiming through a member may include a nominee (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106).

(*b*) *Ibid.*, s. 41 (1); Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 3; and compare *Clayton* v. *Owen* (1862), 31 Beav. 285.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 101.

(*d*) *Ibid.*, s. 41 (1); Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 3. As to exemption of annuities from income tax, see p. 161, *post;* and as to abatement of income tax in respect of premiums on life insurance policies, see title INCOME TAX.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 41 (2).

(*f*) Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I. (15), and Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 15; Sched. I. (21).

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 42. See, *e.g.*, Encyclopædia of Forms and Precedents, Vol. VI., p. 39.

(*h*) *Cowley* v. *Taylor* (1908), 124 L. T. Jo. 569. As to attachment of debts, generally, see titles COUNTY COURTS, Vol. VIII., pp. 570 *et seq.*; EXECUTION, Vol. XIV., pp. 90 *et seq.*

(*i*) *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*, [1906] A. C. 535, P. C. As to expulsion of members without an opportunity of defending themselves, see *Wood* v. *Woad* (1874), L. R. 9 Exch. 190, 196.

SECT. 2. Rights of Members.

288. A member may recover out of the funds of a friendly society damages for a wrong done to him through violation of the society's rules by one of the society's officers (*k*); but a society, one of the objects of which is to provide medical attendance for sick members, is not liable for the consequences of the neglect of a qualified medical man whose services have been secured (*l*).

Liability of society for wrong done by officer.

289. Where a pauper or pauper lunatic is entitled to moneys as a member of a friendly society, whether registered or not (*m*), the poor law guardians can only claim payment of such moneys if (1) there is no wife or other relative dependent on the pauper, (2) the guardians or their relieving officer declare the relief to be given on loan and have given due notice of the declaration to the secretary or trustees of the friendly society, and (3) the relief given is statutory (*n*).

Pauper members.

Guardians have no such claim where the rules of a society provide that moneys payable to a member cease when he becomes an inmate of a workhouse or lunatic asylum (*o*).

A board of guardians may grant relief out of the poor rates to any person otherwise entitled to such relief, though he is in receipt of moneys as a member of a friendly society. In estimating the amount of relief, the guardians may take into consideration the

Outdoor relief to members of societies.

(*k*) *Blue* v. *West Kilbride Free Gardeners' Society* (1866), 4 Macph. (Ct. of Sess.) 1042.

(*l*) *Barnes* v. *Lincoln Oddfellows' Medical Institute* (*Manchester Unity*) *Friendly Society* (1895), 99 L. T. Jo. 217; compare *Stroughair* v. *Vasey* (1879), Diprose and Gammon, 388, and stat. (1879) 42 & 43 Vict. c. 9, repealed by Friendly Societies Act, 1887 (50 & 51 Vict. c. 56). See also Medical Act, 1858 (21 & 22 Vict. c. 90), s. 36; and compare *Hillyer* v. *St. Bartholomew's Hospital* (*Governors*), [1909] 2 K. B. 820, C. A. As to negligence of medical men, generally, see titles MEDICINE AND PHARMACY; NEGLIGENCE.

(*m*) *Merthyr Tydvil Guardians* v. *Cambrian Lodge* (1881), 45 J. P. 220.

(*n*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 23; Poor Law Amendment Act, 1879 (42 & 43 Vict. c. 12), s. 1; *Cardiff Union Guardians* v. *Banks and Neels* (1908), 72 J. P. 319. The following police court or petty sessions cases were decided in reference to the above sections, namely: *St. Leonard's, Shoreditch, Guardians* v. *Marshall* (undated), Diprose and Gammon, 346 (necessary notice not given); *Atcham Union Guardians* v. *Prince of Wales Lodge, Manchester Unity Independent Order of Oddfellows* (1877), Diprose and Gammon, 347; *Meriden Union Guardians* v. *Brown* (1892), Diprose and Gammon, 353; *Dewsbury Poor Law Union Guardians* v. *Thornton* (1878), Diprose and Gammon, 354; *Merthyr Union Guardians* v. *Phillips* (1892), Diprose and Gammon, 354; *Macclesfield Poor Law Guardians* v. *Kettleshume Lodge of Oddfellows* (1881), Diprose and Gammon, 358.

(*o*) *Caistor Union* v. *Cleaver* (1891), 56 J. P. 503. As to the claim of guardians against moneys payable to a member of a trade union, see *Winder* v. *Kingston-upon-Hull Corporation for the Poor* (*Governors and Guardians*) (1888), 20 Q. B. D. 412; and title TRADE AND TRADE UNIONS. For method of enforcing payment, see Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 23 (application to justices at petty sessions), and as to the jurisdiction of justices in the case of a dispute as to the title of the pauper and to payment, see *R.* v. *Richardson*, [1894] 2 Q. B. 323; and title POOR LAW. As to the enforcement of an order of justices, see *R.* v. *Swindon Justices* (1878), 42 J. P. 407; *R.* v. *Joyce* (1884), 48 J. P. 471. As to courts of petty sessions, generally, see title MAGISTRATES.

SECT. 2. Rights of Members.

amount received by him from the society (*p*), only in so far as such sum shall exceed 5*s*. a week (*q*).

Old age pension.

290. A person is not disqualified for receiving a statutory old age pension by habitual failure to work for the maintenance of himself and his family, where he has continuously for ten years up to attaining the age of sixty, by means of payments to friendly, provident, or other societies, made proper provision against old age, sickness, infirmity, or want or loss of employment (*r*).

Notice before forfeiture in collecting society.

291. A person insured in a collecting society, however much in arrear in paying his contribution, does not incur a forfeiture of his benefits until after service upon him of a notice stating the amount due and that his benefit will be forfeited in case of non-payment within a reasonable time, not being less than fourteen days, and default has been made in accordance with that notice (*s*). A forfeiture, however, takes place where a member of a collecting society has to contribute for a certain number of weeks to secure a benefit, and before the period has elapsed changes his residence, makes no further contribution, and then dies after the expiration of the period, though no collector may have called after the change of residence (*t*).

Territorial Force.

292. No rule of a friendly society or branch, whether registered or unregistered, is valid which compels a member of the Territorial Force, by reason of enrolment or service, to forfeit any interest in the society or branch, or under which such person is fined for absence from any meeting, if such absence is occasioned by the discharge of military duty as certified by the commanding officer (*u*). If, however, in the case of societies or branches certified before 23rd July, 1855, the rules in force at the time of enrolment or service provide that a member shall be deprived of any benefit by reason of that enrolment or service, the society or branch may demand an increased rate of contribution (not exceeding one-tenth of the ordinary rate) from a member while on foreign service, or may during such time suspend all claims of the member to benefits and of the society to contributions. On the return of the member to the United Kingdom he must be

(*p*) Outdoor Relief (Friendly Societies) Act, 1894 (57 & 58 Vict. c. 25), s. 1.

(*q*) Outdoor Relief (Friendly Societies) Act, 1904 (4 Edw. 7, c. 32), s. 1 (2).

(*r*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 3 (1) (b); see, further, title POOR LAW.

(*s*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 3. Notice is well served if sent prepaid by post to the assured at his last known place of abode (*ibid.*, s. 16; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26; *Morgan* v. *M'Clure*, [1899] 2 I. R. 209). See, generally, as to service of notice by post, title EVIDENCE, Vol. XIII., p. 556.

(*t*) *Taylor* v. *Collins* (1882), 46 L. T. 168; see *Geoghegan* v. *Campbell* (1907), 41 I. L. T. 58.

(*u*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 43 (1). The section applied in terms to militia, volunteers and yeomanry, but was made applicable to the Territorial Force by an Order in Council of 19th March, 1908 (Statutory Rules and Orders, 1908, p. 962), under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28. As to the Territorial Force, generally, see title ROYAL FORCES.

replaced at once on the same footing as before he went abroad on service (*v*).

Liability of central office on failure of branch.

293. Where a friendly society is subdivided into a central body, districts and branches or lodges, on failure of a branch or lodge, the members are entitled to fall back on the security of the district, and if that fails, upon the security of the central body (*a*).

SECT. 3.—*Payments on Death.*

SUB-SECT. 1.—*In General.*

Sum payable.

294. The moneys payable on the death of a member, in addition to sums payable on policies (*b*), include moneys contributed to, or deposited in, the separate loan account (*c*), and sums accumulated for the use of the member as provided by the Act of 1896 (*d*).

When policy assignable.

295. Policies effected under the Friendly Societies Act, 1875 (*e*), and, it is conceived, under the Act of 1896 (*f*), are *primâ facie* assignable, unless by statute or the rules of the society the policy is deprived of this ordinary incident of property, at any rate where there is no nomination (*g*). Where there is a nomination, it may be that the nominees must be considered as assigns, under an assignment which is revocable only in a particular way, and that their position, unless properly revoked, is conclusive as between them and the society (*h*).

Validity of payment.

Discharge to society.

296. Payment on death made by a registered society or branch to a person appearing to a majority of the trustees to be entitled is valid against any demand made upon the trustees, or the society or branch, by any other person (*i*). Though the society and trustees are discharged if the payment is made in accordance with the provisions of the Act of 1896, the statute does not confer an absolute title on the nominee. A nomination being revocable does not operate as a gift (*k*).

Proof of death.

297. Except in the case of deaths at sea, by colliery explosion, or other accident where the body cannot be found, or where the death

(*v*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 43 (2). As to disputes under s. 43, see p. 182, *post*.

(*a*) *Schofield* v. *Vause* (1886), 36 W. R. 170, n., C. A.; see note (*o*), p. 133, *ante*.

(*b*) As to validity of policies, see *Robinson* v. *Loyal Philanthropic Friendly Society (Trustees)* (1905), 119 L. T. Jo. 414, and title INSURANCE.

(*c*) See Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 46, and p. 165, *post*.

(*d*) See Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 42; and p. 148, *ante*.

(*e*) 38 & 39 Vict. c. 60.

(*f*) 59 & 60 Vict. c. 25.

(*g*) *Re Griffin, Griffin* v. *Griffin*, [1902] 1 Ch. 135, C. A., overruling on this point *Caddick* v. *Highton* (1899), reported [1901] 2 Ch. 476, n.; *Re Redman, Warton* v. *Redman*, [1901] 2 Ch. 471.

(*h*) *Re Griffin, Griffin* v. *Griffin, supra, per* ROMER, L.J., at p. 143. This was so held by PHILLIMORE, J., in *Caddick* v. *Highton, supra*, as reported (1899), 68 L. J. (Q. B.) 281, and was left untouched by the Court of Appeal in *Re Griffin, Griffin* v. *Griffin, supra*.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 60 (1); see *Symington's Executor* v. *Galashiels Co-operative Store Co., Ltd.* (1894), 21 R. (Ct. of Sess.) 371.

(*k*) *Biggs* v. *Lewis* (1890), 89 L. T. Jo. 47. As to the nature of gifts, generally, see title GIFTS, pp. 397 *et seq.*, *post*.

SECT. 3. Payments on Death.

is certified by a coroner to be the subject of a pending inquest or inquiry, proper certificates of death must be produced before a registered society or branch can pay out any moneys on account of death (*l*). Payment without production of a certificate is an offence (*m*).

Liability to legacy duty.

298. If the total sum nominated, after deducting moneys payable for funeral expenses, exceeds £80 at the time of the member's death, then before making any payment the society or branch must require the production of a duly stamped receipt for any legacy or succession duty payable, or a letter or certificate from the Commissioners of Inland Revenue stating that no such duty is payable (*n*). Similar provisions apply in the case of an intestacy (*o*). The Commissioners are bound to give such receipt, letter, or certificate, as the case may be (*p*).

Estate duty.

299. When the principal value of the estate of a person, entitled to make a nomination under the Act of 1896, exceeds £100, any sum paid under that Act without probate or letters of administration is liable to estate duty. The trustees of the society or branch may, before making any such payment, require a statutory declaration by the claimant that the principal value of the estate, including the sum in question, does not, after deduction of debts and funeral expenses, exceed the value of £100 (*q*).

SUB-SECT. 2.—*Nomination.*

Power of nomination.

300. A member aged sixteen years or upwards of a registered society or branch, other than a benevolent society or working men's club, may dispose by nomination of sums not exceeding £100 payable on his death by the society or branch (*r*).

Requirements for valid nomination.

301. The nomination must be in writing (*s*), or in print (*t*), and signed by the nominator (*a*), and delivered at or sent to the registered office of the society or branch (*b*), or given to its

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 61; *Lockett* v. *Barrington* (1892), Diprose and Gammon, 300 (payment without certificate—conviction). It will be noticed that this restriction does not apply to unregistered societies.

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84. A certificate of the death of a member of a registered friendly society or branch may be obtained at a reduced fee, if application is made in the particular form prescribed by the Act (*ibid.*, s. 97 (1)). As to the form, see *ibid.*, s. 98 (5), and Encyclopædia of Forms and Precedents, Vol. VI., p. 71.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 57 (3).

(*o*) *Ibid.*, s. 58 (1).

(*p*) *Ibid.*, s. 57 (4). See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192.

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 59. See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192. As to legacy and succession duties, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 192 *et seq.*

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (1). For form o nomination, see Encyclopædia of Forms and Precedents, Vol. VI., p. 69.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (1).

(*t*) See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20.

(*a*) *Wright* v. *Darkhouse Friendly Society* (1890), Diprose and Gammon, 407. Signature by mark is insufficient, even if attested by two witnesses (*Morton* v. *French*, [1908] S. C. 171).

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (1).

secretary (*c*), and recorded (*d*) during the life of the nominator (*e*); or it must be made in a book kept at the office (*f*).

Will as nomination.

A will may operate as a nomination when the original will is left in the custody of the society at the registered office; mere production of the will, or probate thereof, is not sufficient (*g*); conversely, an invalid nomination, if executed in accordance with the Wills Act, 1837, may operate as a will (*h*).

Money payable elsewhere than at member's branch.

A nomination by a member of a registered branch delivered at or sent to the registered office of that branch, or made in a book kept at that office, is effectual, notwithstanding that the money to which the nomination relates, or some part of it, is not payable by that branch, but is payable by the society or some other branch (*i*).

Who may be nominated.

302. A nomination cannot be made in favour of an officer or servant of the society or branch, unless that officer or servant is the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator (*j*). Where the rules of a society specify relations who may be nominated, but do not expressly exclude all others, the nominees need not be relations (*k*). It is doubtful whether a nomination may be made to more than one nominee, or whether it must nominate all the moneys standing to the credit of a member (*l*).

Revocation or variation of nomination.

303. A nomination may be revoked and varied by a document under the hand of the nominator, delivered, sent, or made in the same way as a nomination (*m*). A nomination is not revocable by will unless the original will is left in the custody of the society at the registered office; mere production of the will or of the probate

(*c*) *Hughes* v. *Hardy* (1885), Diprose and Gammon, 402.

(*d*) Treasury Regulations, 1897 (25). Fee for recording not to exceed 3*d.* (*ibid.*).

(*e*) *Fielding and Lord* v. *Rochdale Equitable Pioneers Society* (1892), 92 L. T. Jo. 431.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (1).

(*g*) *Fielding and Lord* v. *Rochdale Equitable Pioneers Society, supra.* As to probate of wills, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 151 *et seq.* As to construction of wills, see title WILLS.

(*h*) *In the Goods of Baxter*, [1903] P. 12; and see title WILLS.

(*i*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 5.

(*j*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (3).

(*k*) *Lavin* v. *Howley* (1897), 102 L. T. Jo. 560.

(*l*) See Report of Chief Registrar, 1886 (74), where the opinion of the law officers of the Crown was taken on the meaning of a similar section (s. 5) of the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), the view of Sir Horace Davey, Sir Richard Webster, and Sir Edward Clarke being that the nomination must exhaust the whole sum. Sir C. Russell was of the opposite opinion (see also *Bennett* v. *Slater*, [1899] 1 Q. B. 45, C. A.). Sir H. Davey and Sir C. Russell expressed the opinion that the nomination might be made in favour of several nominees, Sir R. Webster and Sir E. Clarke that it could be made only in favour of a single nominee (see also *Fielding and Lord* v. *Rochdale Equitable Pioneers Society, supra,* where no comment was made on a nomination in favour of seven persons).

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (4). A variation or revocation is effectual, though the money to which the nomination relates, or some part of it, is not payable by that branch, but is payable by the society or some other branch (Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 5). For forms of revocation or variation, see Encyclopædia of Forms and Precedents, Vol. VI. p. 69.

SECT. 3. **Payments on Death.**

is not sufficient (*n*). Marriage of a member of a society or branch operates as a revocation of any nomination made prior to it by that member (*o*); but the receipt of a nominee is a valid discharge to the society or branch where, in ignorance of a marriage subsequent to the nomination, it has paid money to the nominee (*p*).

Marriage.

Payment on death of nominator.

304. On receiving satisfactory proof of the death (*q*) of a nominator, the society or branch is bound to pay to the nominee the amount due to the deceased member, not exceeding £100 (*r*), whether the member leaves a will or not. The receipt of a nominee over sixteen years of age is valid (*a*). There is a *primâ facie* presumption that the nominee is intended to take beneficially, but it is a question depending on evidence, and the executor, and presumably the administrator, may in a proper case demand repayment from the nominee (*b*), subject to sums expended by the latter for doctors' fees and funeral expenses (*c*).

Nominator in receipt of poor relief.

305. Where a nominator becomes chargeable as a pauper lunatic, and dies after moneys have been spent in his relief by the guardians, the guardians are not entitled to be recouped out of the policy moneys payable by the society, such moneys being payable to the nominee (*d*).

SUB-SECT. 3.—*Payments apart from Nomination.*

Payment on death of member—
(i.) testate;
(ii.) intestate.

306. If a member of a registered society or branch dies testate, and without having made a nomination then subsisting, the moneys due to him from the society are payable to his executor.

If he dies intestate, and without making a nomination, two courses are open to the society. It may either pay over the money to the administrator on letters of administration being taken out, or, if the sum does not exceed £100, may without letters of administration distribute the sum among such persons as reasonably appear to a majority of the trustees to be entitled by law (*e*), having regard to all the circumstances of the case, to the amount and nature of the claim, and the probabilities of the claimants being

(*n*) *M'Kee* v. *Meikle* (1893), 27 I. L. T. 100; *Fielding and Lord* v. *Rochdale Equitable Pioneers Society* (1892), 92 L. T. Jo. 431; *Lavin* v. *Howley* (1897), 102 L. T. Jo. 560; *Bennett* v. *Slater*, [1899] 1 Q. B. 45, C. A.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 27), s. 56 (5).

(*p*) *Ibid.*, s. 60 (2).

(*q*) As to proof of death, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 61. For form of notice of death and application by nominee, see Encyclopædia of Forms and Precedents, Vol. VI., p. 68; and for form of application for wife's funeral money, see *ibid.*, p. 67.

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 57 (1).

(*a*) *Ibid.*, s. 57 (2).

(*b*) *Ibid.*, s. 60 (1); *Lavin* v. *Howley*, *supra*; *Biggs* v. *Lewis* (1890), 89 L. T. Jo. 47. The presumption seems to be against an executor-nominee taking beneficially (*Re Read, Turner* v. *Read* (1896), 75 L. T. 295). Compare title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 284, 285.

(*c*) *Hughes* v. *Parry* (1892), 93 L. T. Jo. 131.

(*d*) *Cardiff Union Guardians* v. *Banks and Neels* (1908), 72 J. P. 319.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58 (1). The power of the trustees to adopt the second alternative is discretionary (*Escritt* v. *Todmorden Co-operative Society*, [1896] 1 Q. B. 461).

the persons who are entitled (*f*). Ignorance of a fact which might have been ascertained will not justify a society in paying the wrong person, or absolve it from paying the right one (*g*). In ascertaining the persons "entitled by law," the society may dispense with strict evidence of title and relationship, but may not alter the title or select one out of a number of next of kin as sole payee, even with the consent of the majority (*h*).

Illegitimate member, intestate.

307. On the death of an illegitimate member, intestate and without having made any nomination then subsisting, the trustees may pay the sum which might have been nominated to the persons who, in the opinion of the majority of the trustees, would have been entitled if the member had been legitimate. If there are no such persons, the society or branch must deal with the money according to the direction of the Treasury (*i*).

Channel Islands or Isle of Man.

308. If a deceased member who was domiciled in the Channel Islands or Isle of Man fails to nominate, when entitled so to do, the sum payable must be paid to his legal representative according to the law of the island of domicil (*k*).

Death allowances payable according to prices.

309. Where according to the rules of an unregistered friendly society death allowances are payable to certain specified relatives of a deceased member, unless otherwise bequeathed by his will, the legal personal representative of a member dying intestate is not entitled to the money as assets for the payment of the deceased's debts (*l*). It would be otherwise if the deceased member had exercised the power of bequeathing the money (*m*).

Amount payable on death of a child.

310. No society or branch, whether registered or unregistered, may insure or pay on the death of a child any sum of money which, added to any amount payable on the death of that child by any other society, exceeds, in the case of a child under five years, £6, or, in the case of a child under ten years, £10 (*n*).

(*f*) *Nelson* v. *Royal London Friendly Society* (1896), Diprose and Gammon, 544, 550.

(*g*) *Garrat* v. *Liverpool Victoria Legal Friendly Society* (1897), Diprose and Gammon, 554.

(*h*) *Symington's Executor* v. *Galashiels Co-operative Store Co., Ltd.* (1894), 21 R. (Ct. of Sess.) 371; and as to the exoneration of trustees, see p. 145, *ante*.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58 (2).

(*k*) *Ibid.*, s. 105.

(*l*) *Ashby* v. *Costin* (1888), 21 Q. B. D. 401; *Re Davies, Davies* v. *Davies*, [1892] 3 Ch. 63; see also *Harris* v. *United Kingdom Postal and Telegraph Service Benevolent Society* (1889), 87 L. T. Jo. 272, where the claim of a nominee to moneys resulting from a death levy prevailed over that of the administrator of the deceased member.

(*m*) *Ashby* v. *Costin*, *supra*.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 62. Ss. 62—67 and 84, *ibid.*, relating to payments on the death of children, extend to all industrial assurance companies (Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict c. 26), s. 13), and not only to those which fall within the latter Act; see *Newbold Friendly Society* v. *Barlow*, [1893] 2 Q. B. 128; and as to insurance on lives of infants, see also title INFANTS AND

SECT. 3. **Payments on Death.**

On the death of a child under ten years, payment of the insurance money must be made by the society or branch, whether registered or unregistered, either to the parent or his personal representative, upon production of a proper certificate of death (*o*).

Inquiry by society.

Before paying the insurance money, the society or branch, whether registered or unregistered, to which a death certificate, not purporting to be the first, is produced, must inquire whether any and what sums of money have been paid on the same death by any other society or branch (*p*).

Saving as to insurable interests.

The foregoing provisions respecting payments on the deaths of children do not apply to insurances on the lives of children of any age where the insurer has an insurable interest in the life of the insured (*q*).

SECT. 4.—*Liabilities of Members.*

Liability for subscriptions.

311. Subscriptions by members of registered friendly societies are voluntary (*r*), and such societies cannot sue a member for arrears or current subscriptions (*s*). Sums of money payable by a member to a registered cattle insurance society or branch or to specially authorised societies or branches designated by the Treasury, are regarded as debts, and recoverable as such in the county court (*a*).

The rules of a society must provide for the consequences of non-payment of any subscription or fine (*b*), but such a rule cannot give the society power to sue (*c*). Fines imposed by rules may be recovered in a court of summary jurisdiction (*d*), but cannot be enforced if unreasonable (*e*).

CHILDREN. See, further, titles COMPANIES, Vol. V., pp. 625, 626; INSURANCE.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 63. For form of application for child's funeral money, see Encyclopædia of Forms and Precedents, Vol. VI., p. 68. An application for the certificate of the death of a child, for the purpose of obtaining a sum of money from a society or branch, must state the name of the society or branch, and the sum claimed. The registrar of deaths puts a corresponding statement on the certificate, and where more than one certificate is required numbers them consecutively (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 64; as to fees, see *ibid.*, s. 97). No certificate or certificates of death may be granted for the payment in the whole of any sum exceeding £6 on the death of a child under five years, or exceeding £10 on the death of a child under ten years (*ibid.*, s. 65 (1)). Nor may any such certificate be granted unless the cause of death has been previously entered in the register of deaths, on the certificate of a coroner, or of the doctor in attendance during the child's last illness, or except upon the production of a doctor's certificate of the probable cause of death, or of other satisfactory evidence of death (*ibid.*, s. 65 (2)). As to penalties, see p. 185, *post*.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 66.

(*q*) *Ibid.*, s. 67. As to insurable interest, see *Howard* v. *Refuge Friendly Society* (1886), 54 L. T. 644 (child's insurable interest in parent's life), and title INSURANCE.

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (1).

(*s*) *Ibid.*, s. 23; see *Cockerell* v. *Aucompte* (1857), 2 C. B. (N. S.) 440; *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 31 (2).

(*b*) *Ibid.*, s. 9 (3), Sched. I. (2); see also Encyclopædia of Forms and Precedents, Vol. VI., p. 30. As to expulsion for non-payment, see p. 157, *post*.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 23.

(*d*) *Ibid.*, s. 91 (1).

(*e*) *Lovejoy* v. *Mulkern* (1877), 46 L. J. (CH.) 630, C. A.

SECT. 4. Liabilities of Members.

312. Where the funds of a society have been improperly divided among members, the members may be ordered to refund the amount received by them (*f*).

Liability to refund.

SECT. 5.—*Termination and Transfer of Membership.*

Withdrawal.

313. Where by the rules of a mutual guarantee society notice of the withdrawal of any of the members is required, but no particular form is prescribed, nor is it stated to whom notice is to be given, parol notice given by a member to the agent through whom the original contract with the society was made is sufficient (*g*).

Expulsion.

314. Non-payment for a certain period usually, under the rules (*h*), renders a member liable to expulsion (*i*). A person who complains that he has been wrongfully expelled from a society may appeal to the court for an injunction restraining the society from excluding him (*k*), and in a proper case may be awarded damages (*l*). A dispute whether a member or person aggrieved is entitled to be, or continue to be, a member, or to be reinstated as a member, is to be decided in manner directed by the rules (*m*).

Expulsion of branch.

On the expulsion of a branch from a society, the members of the branch cease to be members of the society (*n*).

Expulsion of member.

Where under the rules of a friendly society it is a condition that a member should be, and continue to be, a member of another institution, by ceasing to belong to the latter institution the member automatically ceases to belong to the society, and a resolution expelling him cannot be set aside by the court (*o*).

Transfers.

315. A member of, or person insured with, a collecting society may not be transferred (*p*) to any other such society without his written consent. In the case of an infant, the written consent of the father or guardian is necessary (*q*). This rule does not apply where a statutory amalgamation, transfer of engagements, or conversion into a company takes place (*r*).

Any attempt to transfer a member of, or insurer in, one

(*f*) *James* v. *Barrett* (1882), Diprose and Gammon, 292.

(*g*) *Re Solvency Mutual Guarantee Society, Hawthorne's Case* (1862), 31 L. J. (CH.) 625.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (2).

(*i*) See, *e.g.*, Encyclopædia of Forms and Precedents, Vol. VI., pp. 30, 46.

(*k*) *Palliser* v. *Dale*, [1897] 1 Q. B. 257, C. A., approving *Prentice* v. *London* (1875), L. R. 10 C. P. 679; *Willis* v. *Wells*, [1892] 2 Q. B. 225.

(*l*) *Blue* v. *West Kilbride Free Gardeners' Society* (1866), 4 Macph. (Ct. of Sess.) 1042.

(*m*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 6. Prior to the passing of this Act, the contrary was decided in *Prentice* v. *London*, *supra*. See further, as to jurisdiction to expel members, pp. 176, 177, *post*.

(*n*) *Smith* v. *Brailsford* (1895), 40 Sol. Jo. 13.

(*o*) *Sargeant* v. *Butterworth* (1907), 23 T. L. R. 450. See further, as to expulsion, pp. 176, 177, *post*.

(*p*) The word "transferred" is used in the popular, not the legal, sense (*Pearl Life Assurance Co.* v. *Scottish Legal Life Assurance Society*, [1901] 1 K. B. 528).

(*q*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 4 (1).

(*r*) *Ibid.*, s. 4 (1) (a). See Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 70—72, and pp. 192—195, *post*.

SECT. 5. Termination etc. of Membership.

collecting society to another society must be notified by the latter society to the former within seven days from the application by the member for admission (*s*).

Part VII.—Meetings and Special Resolutions.

SECT. 1.—*Meetings.*

Meetings generally.

316. The rules of registered societies must provide for the mode of holding meetings (*t*).

In the case of collecting societies.

317. In the case of collecting societies at least one annual general meeting is necessary (*a*). Except where the day, hour, and place of an annual or other periodical meeting is fixed by the rules, notice of every general meeting, specifying the day, hour, place, and object of the meeting, and containing a copy of any amendment of a rule intended to be proposed, must be advertised at least twice in two or more local county newspapers, or served upon every member at least fourteen days before the day of the meeting, and during those fourteen days a copy of the notice must be affixed in or outside every office of the society (*b*).

A collector of a collecting society is incapable of voting at or taking any part in the proceedings of any meeting of the society (*c*).

Power of registrar to call special meeting.

318. The Chief Registrar may, with the consent of the Treasury, call a special meeting on the application of one-fifth of the members of a registered society (not including a society with branches, except

(*s*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 4 (2); *Pearl Life Assurance Co.* v. *Scottish Legal Life Assurance Society*, [1901] 1 K. B. 528. Attempts to transfer without consent, and failure to give the requisite notices, are statutory offences (Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 14); see, further, as to offences, p. 184, *post*. See also *Macintosh* v. *Metcalfe* (1886), 1 White, 218; *Refuge Assurance Co.* v. *Hannan and M'Gill* (1889), 2 White, 373.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (3). The expression "meeting" includes, where the rules of a society or branch so allow, a meeting of delegates appointed by members (*ibid.*, s. 106). Rules usually provide for holding ordinary meetings, including the annual general meeting, at fixed dates and at a fixed place, for special meetings to be called at any time by the direction of the committee or by a requisition from a certain number of members, for notice of special meetings to be given and for forming a quorum, for use or non-use of proxies, and appointment, and in case of equality, for casting vote of chairman (see Encyclopædia of Forms and Precedents, Vol. VI., pp. 30, 31, 46, 47). For form of requisition for special meeting, see *ibid.*, p. 87, Form 47. See further, as to meetings, title COMPANIES, Vol. V., pp. 247 *et seq.*

(*a*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 5 (1). There is no corresponding provision in the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

(*b*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 5 (2), (4). See, further, *ibid.*, s. 5 (3), (5), as to contents and publication of such notice. As to notice generally, see title COMPANIES, Vol. V., p. 252.

(*c*) *Ibid.*, s. 8 (c).

with the consent of the central body (*d*)), or of 100 if there are from 1,000 to 10,000 members, or of 500 where there are more than 10,000 members (*e*).

Evidence in support.

The application must be supported by such evidence, showing good reason for the meeting and absence of malicious motives in the applicants, as the registrar directs.

Notice.

Notice of the application must also, in accordance with his direction, be given to the society (*f*);

Security for costs.

and he may require the applicants to give security for the cost of the proposed meeting (*g*).

Expenses.

The expenses in connection with or preliminary to such special meeting are payable at the discretion of the registrar by the applicants, or out of the society's funds, or by members or officers or former members or officers (*h*).

Time and place.

The registrar may determine the time and place of the meeting and the matters to be discussed, and the meeting will have all the powers of a meeting called under the rules, and may appoint its own chairman (*i*). The chairman of the special meeting must send a report of what takes place to the registrar (*k*).

Place of meeting.

319. Where the place of meeting is fixed by the rules, which provide for their alteration only at a meeting of the society legally convened, rules altered at a meeting held elsewhere are void (*l*).

Who must convene meeting.

The secretary or other officer of a friendly society served with a requisition, duly signed in accordance with the rules, to call a meeting for the purpose of altering or rescinding the rules must convene the meeting (*m*).

Privileges of registered societies.

320. Registered societies and branches and their meetings are exempt from the provisions of the Unlawful Societies Act, 1799 (*n*), and the Seditious Meetings Act, 1817 (*o*), if their operations are confined to the business provided for by the rules (*p*); but this exemption does not apply if on the request of two justices of the peace full information is not given by such societies or branches of their nature, proceedings, and practices (*q*).

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (7).

(*e*) *Ibid.*, s. 76 (1). For form of application, see Encyclopædia of Forms and Precedents, Vol. VI., p. 88; Treasury Regulations, 1897 (48), Form AD. The fee for calling a special meeting is £1, payable in advance (Treasury Regulations, 1897 (70)).

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (2). For form of statutory declaration in support of such application, see Encyclopædia of Forms and Precedents, Vol. VI., p. 89; Treasury Regulations, 1897 (48), Form AE; and for form of notice, see Treasury Regulations, 1897 (51), Form AG.

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (3).

(*h*) *Ibid.*, s. 76 (4); Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 7.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (6).

(*k*) Treasury Regulations, 1897 (52), Form AH; Encyclopædia of Forms and Precedents, Vol. VI., p. 90.

(*l*) *R.* v. *Tidd Pratt* (1865), 6 B. & S. 672.

(*m*) *R.* v. *Bannatyne* (1851), 20 L. J. (Q. B.) 210; see *R.* v. *Aldham and United Parishes Insurance Society* (1854), 2 W. R. 456 (mandamus to officer to convene meeting not granted in special circumstances).

(*n*) 39 Geo. 3, c. 79.

(*o*) 57 Geo. 3, c. 19.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 32 (1). See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 466.

(*q*) *Ibid.*, s. 32 (2).

SECT. 1. **Meetings.**

Power of entry by constable.

321. A constable is not entitled to enter a private room in a public-house hired by a friendly society for holding a secret meeting, unless he has reasonable ground to suspect actual or probable circumstances constituting a violation of the Licensing Acts (*r*).

SECT. 2.—*Special Resolutions.*

Special resolutions.

322. Special resolutions are required for certain purposes specified in the Act of 1896 (*s*).

Definition.

For those purposes a special resolution is a resolution which is (1) passed by a majority (*t*) of not less than three-fourths of such members of a registered society (not a branch) entitled under the rules to vote, as may be present in person or by proxy (*a*) (where the rules allow proxies) at any general meeting of which notice specifying the intention to propose that resolution has duly been given according to the rules (*b*), and (2) confirmed by a majority of such members at a subsequent general meeting, of which notice has duly been given, held not less than fourteen days, nor more than one month, from the day of the meeting at which such resolution was first passed (*c*). At any such meeting a declaration by the chairman that the resolution has been carried is conclusive evidence (*d*).

Registration.

A copy of every special resolution for any of the purposes mentioned in the Act of 1896, signed by the chairman of the meeting and countersigned by the secretary, must be sent to the Central Office and registered, and until the copy is registered the special resolution is ineffective (*e*). Failure to send a special resolution to the Central Office for registry is an offence (*f*).

323. Where the rules of a parent society provide that on the secession of a branch a special general meeting of that branch

(*r*) *Duncan* v. *Dowding*, [1897] 1 Q. B. 575; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 81; and see title INTOXICATING LIQUORS. As to entry upon club premises, see title CLUBS, Vol. IV., pp. 434—437.

(*s*) 59 & 60 Vict. c. 25, ss. 69—71 (change of name, amalgamation or transfer of engagments, conversion into a company; as to which, see p. 135, *ante*, and pp. 192, 193, *post*).

(*t*) As to powers of majority to bind minority, see *M'Kenny* v. *Barnsley Corporation* (1894), 10 T. L. R. 533, C. A.

(*a*) As to the stamping of proxies, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33 (d).

(*b*) *Ibid.*, s. 74 (a).

(*c*) *Ibid.*, s. 74 (b); compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (repealing and re-enacting Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51, which is substantially the same as the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 74), and the cases on that section; see also title COMPANIES, Vol. V., p. 259.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 74; see title COMPANIES, Vol. V., p. 260.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 75. The fee for registration is 10*s.* (Treasury Regulations, 1897 (70)). Registration is effected by writing at the foot of the copy the word "registered," and affixing the seal or stamp of the Central Office (Treasury Regulations, 1897 (46)). As to registration of special resolutions passed by societies registered as doing business exclusively in Scotland or Ireland, see Treasury Regulations, 1897 (47).

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84 (penalty, fine not more than £5 (*ibid.*, s. 89)); see, further, as to offences, p. 184, *post*.

must be held, and direct that the assent of three-fourths of the members must be obtained, the assent of the parent society to the meeting is not necessary, but the majority of the branch members, and also the majority at the special meeting, must assent to the secession (*g*).

SECT. 2. Special Resolutions.

Part VIII.—Privileges of Registered Societies (*h*).

SECT. 1.—*Exemption from Stamp Duties, Income Tax etc.*

324. Stamp duty is not chargeable upon any of the following documents (*i*), namely: (1) a draft (*k*), order, or receipt given by or to a registered society or branch in respect of money payable by virtue of its rules or of the Act of 1896; (2) a letter or power of attorney granted by any person as trustee for the transfer of any money of a registered society or branch invested in his name in the public funds; (3) a bond given to or on account of a registered society or branch, or by the treasurer or other officer thereof (*l*), and (4) a policy of insurance or appointment or revocation of appointment of agent or other document required or authorised by the Act of 1896, or by the rules of a registered society or branch (*m*).

Exemption from stamp duty.

A mortgage or transfer of mortgage made to a friendly society is not, however, exempt from stamp duty, although the society is empowered by its rules to invest on mortgage (*n*), nor, probably, is a receipt for rent given by a society when in possession as mortgagee (*o*).

Exceptions.

325. The stock, dividends, or interest of any registered friendly society, restricted by Act of Parliament or by its rules from assuring to any person any gross sum exceeding £300 or an annuity of £52, are exempt from duties chargeable under Schedule C of the Income Tax Act, 1842 (*p*). In the case of property belonging to a society, which is invested in public securities in the Bank of England, to secure exemption the ownership must be proved by a trustee,

Exemption from Income Tax. Schedule C.

(*g*) *Re Sheffield Order of Druids Society* (1892), 56 J. P. 613.

(*h*) See note (*a*), p. 123, *ante*, for list of the advantages a registered has over an unregistered society.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33.

(*k*) *E.g.*, a cheque drawn by the society on its banker (Official Circular, November 10th, 1894; Alpe, Law of Stamp Duties, 11th ed., p. 268). As to stamps, generally, see title REVENUE.

(*l*) *E.g.*, a bond for the production of a box containing the subscriptions of a society (*Carter* v. *Bond* (1803), 4 Esp. 253).

(*m*) *E.g.*, a statutory receipt vacating a mortgage under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (1); see title BUILDING SOCIETIES, Vol. III., p. 372, and, generally, titles MORTGAGE; REVENUE.

(*n*) *Re Royal Liver Friendly Society* (1870), L. R. 5 Exch. 78; see *Walker* v. *Giles* (1848), 6 C. B. 662, a case decided on the language of stat. (1829) 10 Geo. 4, c. 56, s. 37.

(*o*) *A.-G.* v. *Phillips* (1871), 24 L. T. 832.

(*p*) 5 & 6 Vict. c. 35.

SECT. 1. Exemption from Stamp Duties, Income Tax etc.

treasurer, or member of the society before the Commissioners for Special Purposes (*q*).

Legally established friendly societies entitled to exemption under the Income Tax Act, 1842 (*r*), are also entitled to exemption in respect of their stocks, dividends, and interest, and other profits and gains chargeable respectively under Schedules C and D of the Income Tax Act, 1853 (*s*), and to the like allowances in respect of any charge under Schedule A, to be made on the lands belonging to the society as are granted to colleges and other properties (*t*).

Schedule D.

Schedule A.

Corporation duty.

326. The property of registered societies is exempt from the duty imposed on the annual value, income, or profits of all real and personal property which belongs to or is vested in any body corporate or unincorporate (*u*).

Reversion and other duties.

327. The fee simple of, or any interest in, any land held by a registered society is in certain circumstances exempt from reversion duty, undeveloped land duty, and increment value duty (*v*).

SECT. 2.—*Priority over Creditors of Officer.*

On death of officer.

328. Upon the death of an officer of a registered society or branch having in his possession by virtue of his office money or property belonging to the society or branch, his heirs or personal representatives, as the case may be, must, upon the demand in writing of the trustees of the society or branch, or of any person authorised to make the demand, pay the money and deliver over the property to the trustees in preference to any other debt or claim against the officer's estate (*w*).

On bankruptcy of or in execution against officer.

329. A registered society or branch has a similar priority against other creditors, (1) in the event of the bankruptcy of an officer or of

(*q*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88, Sched. C (1); the exemption granted by this Act applies to any friendly society legally established under any statute relating to friendly societies (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 70). See generally, as to these commissioners and as to abatement of income tax, title INCOME TAX As to the exemption from rates of societies established under the special authorities of 5th July, 1878, and 3rd October, 1879, see note (*b*), p. 125, *ante*, and title LITERARY AND SCIENTIFIC INSTITUTIONS.

(*r*) 5 & 6 Vict. c. 35.

(*s*) 16 & 17 Vict. c. 34, s. 49.

(*t*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 12. As to a friendly society which claims exemption owing to its income not exceeding £160, being also entitled to claim exemption from land tax on land held by it as mortgagee in possession, see Finance Act, 1898 (60 & 61 Vict. c. 10), s. 12. See also title CHARITIES, Vol. IV. p. 208.

(*u*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11 (4). As to principles of assessment, see *Re Surrey County Cricket Club*, [1901] 2 K. B. 400. As to exemption of unregistered societies, see *Glasgow Tailors' Incorporation* v. *Inland Revenue Commissioners* (1887), 24 Sc. L. R. 516; *Re Linen and Woollen Drapers etc. Institution* (1887), 58 L. T. 949; title CHARITIES, Vol. IV., pp. 207, 208.

(*v*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 37. See, further, title REVENUE.

(*w*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35. "Demand in writing" would cover a writ or summons (see *Absolom* v. *Gething* (1863), 32 Beav. 322 (service of bill in Chancery). See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 250.

SECT. 2. Priority over Creditors of Officer.

the liquidation of his affairs by arrangement, and (2) in the event of an execution, attachment, or other process against an officer or his property, the sheriff or other person executing the process in such circumstances being bound to hand over the property taken in execution (*x*).

Preference construed strictly.

330. A statutory enactment giving preference is construed strictly as it is against common right (*a*).

Crown debt.

It is doubtful whether the preferential right of friendly societies would prevail against the Crown (*b*). Where the treasurer of a friendly society to which he owes money becomes bankrupt, and his landlord distrains for rent, the landlord, as between himself and the society, may retain the proceeds of the distress (*c*).

Rent.

Loss of priority.

Neglect to obtain from the treasurer the protection of a bond or other security required by statute (*d*) or the rules of the society deprives the society of its claim to priority (*e*); but a society does not lose its priority by reason of the bankrupt officer being beneficially interested in the property of the society (*f*), or by being negligent in examining its accounts (*g*).

When preference applies.

331. The preferential right of friendly societies is not applicable except in the case of properly constituted officers (*h*). It does not apply in the case of a society's bankers (*i*), even though appointed under the rules (*k*), or to moneys lent, by the consent of a society upon a promissory note carrying interest, to a person who practically acts as treasurer, though not appointed (*l*). The

(*x*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35; *Re Woodliffe, Ex parte Ray* (1839), 3 Deac. 537; *Shakespere Lodge Manchester Unity Independent Order of Oddfellows (Trustees)* v. *Graham* (1877), Diprose and Gammon, 85; *Loyal Agincourt Lodge Manchester Unity Independent Order of Oddfellows (Trustees)* v. *Woods* (1877), Diprose and Gammon, 84 (county court); and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 25; BUILDING SOCIETIES, Vol. III., p. 346; and as to execution generally, see title EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*a*) *Re Jardine, Ex parte Fleet* (1850), 4 De G. & Sm. 52; *Re Aberdein* (1896), 13 T. L. R. 7.

(*b*) *Ex parte Amicable Society of Lancaster* (1801), 6 Ves. 98.

(*c*) *Re Thomas* (1876), Diprose and Gammon, p. 64.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 54.

(*e*) *Ex parte Ross* (1802), 6 Ves. 802; *John O'Gaunt Lodge of Oddfellows* v. *Bell* (1883), Diprose and Gammon, 67 (county court); *Re Clarke, Ex parte Haynes* (1844), 3 Mont. D. & De G. 663.

(*f*) *Re Clarbon, Ex parte Crowley* (1837), 2 Deac. 555.

(*g*) *Absolom* v. *Gething* (1863), 32 Beav. 322; *Moors* v. *Marriott* (1878), 7 Ch. D. 543 (building society); see *Re Baker, Ex parte Burge* (1841), 1 Mont. D. & De G. 540; *Re Welch, Ex parte Oddfellows' Society (Trustees)* (1894), 63 L. J. (Q. B.) 524, *per* WRIGHT, J., at p. 526.

(*h*) *Re Thick, Ex parte Buckland* (1818), Buck, 214; *Re Aberdein, supra.* For definition of officers, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106, and note (*l*), p. 142, *ante;* see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 215.

(*i*) *Re Rufford and Wragge, Ex parte Orford* (1852), 1 De G. M. & G. 483; *Re Wise, Ex parte Whipham* (1844), 3 Mont. D. & De G. 564; *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (1879), 11 Ch. D. 768; but see *Re Batson, Ex parte Riddell* (1842), 3 Mont. D. & De G. 80.

(*k*) *Re Clarke, Ex parte Harris* (1845), De G. 162.

(*l*) *Ex parte Ross* (1802), 6 Ves. 802; *Ex parte Ashley, Ex parte Corser* (1801), 6 Ves. 441; see *Ex parte Stamford Friendly Society* (1808), 15 Ves. 280; *Re Shattock, Ex parte Long Ashton Junior Friendly Society* (1861), 5 L. T. 370.

SECT. 2. Priority over Creditors of Officer.

right applies even where the officer has been removed from office before the date of his bankruptcy (*m*).

Where the defaulting officer is in partnership with another person, and both become bankrupt, the society is entitled to preference only out of the separate estate of the officer (*n*).

SECT. 3.—*Exemption from Assurance Companies Act*, 1909.

Assurance Companies Act, 1909.

332. The Assurance Companies Act, 1909 (*o*), does not apply to registered friendly societies (*p*). The Board of Trade may, on the application of an unregistered friendly society, and after consultation with the Chief Registrar of Friendly Societies, confer a similar exemption on such society (*q*).

Part IX.—Property and Funds.

SECT. 1.—*Borrowing and Lending.*

SUB-SECT. 1.—*Borrowing.*

Power to borrow.

333. A registered society not specially authorised has apparently no power to borrow except upon mortgage of its real and leasehold estates (*r*). Power to mortgage must be contained in the rules; but a mortgagee is not bound to inquire as to the authority (*s*), and if money has been borrowed and applied for the benefit of a society, the debt cannot be repudiated for lack of formality in the security (*a*).

Additional powers.

334. Money may in pursuance of rules be borrowed from members or from other persons by any registered society specially

(*m*) *Re Eilbeck, Ex parte Good Intent Lodge, No.* 987, *of the Grand United Order of Odd Fellows* (*Trustees*), [1910] 1 K. B. 136, following *Re Miller, Ex parte Official Receiver*, [1893] 1 Q. B. 327, C. A. In *Re Eilbeck, Ex parte Good Intent Lodge, No.* 987, *of the Grand United Order of Odd Fellows* (*Trustees*), *supra*, the bankruptcy supervened after the debtor had ceased to be, and in *Re Miller, Ex parte Official Receiver, supra*, while the debtor was still, an officer of the society. See also *Re Batson, Ex parte Riddell* (1842), 3 Mont. D. & De G. 80. A society is entitled to preferential payment out of the estate of a bankrupt treasurer, whose assets consist only of stock in trade and furniture, not specifically belonging to the society (*Re Atkins, Ex parte Edmonds* (1882), 51 L. J. (CH.) 406).

(*n*) *Re Ashley, Ex parte Appach* (1840), 1 Mont. D. & De G. 83. As to liability of partner's separate estate, generally, see title PARTNERSHIP.

(*o*) 9 Edw. 7, c. 49; see title COMPANIES, Vol. V., pp. 620, 625. As to the effect of the Act on policies issued by collecting societies, see title COMPANIES, Vol. V., p. 626.

(*p*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1.

(*q*) *Ibid.*, s. 35.

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 47 (1). The power to mortgage conferred by this sub-section implies, it seems, a power to borrow. Probably a covenant binding the society may be contained in the mortgage, see *Wenlock* (*Baroness*) v. *River Dee Co.* (1883), 36 Ch. D. 675, n., 681, n., C. A. As to mortgage generally, see title MORTGAGE.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 47 (1).

(*a*) *Pare* v. *Clegg* (1861), 29 Beav. 589; see also *Jones* v. *Woollams* (1822), 1 Dow. & Ry. (K. B.) 393.

authorised, having for its object the creation of funds to be lent to members or for their benefit, and having in its rules provisions that (1) no part of its funds shall be divided among the members, and (2) all money lent to members shall be applied to such purpose as the society or its committee may approve (*b*).

SUB-SECT. 2.—*Lending.*

Power to lend.

335. Apart from statutory authority, the trustees of a friendly society have no authority to lend the money of the society (*c*).

Loan fund.

336. A registered society, when so authorised by its rules, has power to create a separate loan fund by receiving contributions or deposits from its members (*d*).

No member of a registered society may have an interest in the loan fund exceeding £200 (*e*); nor may a registered society hold at any one time on deposit from its members any money beyond the amount fixed by the rules, which amount must not exceed two-thirds of the total sums owing to the society by the members who have borrowed from the loan fund (*f*).

Loans out of separate fund.

A registered society, but not a branch, may make loans to members out of the loan fund, but not out of moneys contributed for the other purposes of the society. Such loans may be made on the personal security of members with or without sureties, and to the amount provided by the rules; but no loan may be made which, together with any money owing by a member to the society, exceeds £50 (*g*).

Loans to assured members.

337. A loan may be made by a registered society, and, if the rules permit, by a registered branch, to an assured member of at least one full year's standing on the written security of himself and two satisfactory sureties. The amount lent must not exceed one half of the amount for which the life of the member is assured. The amount advanced, with interest, may be deducted from the sum assured, without prejudice in the meantime to the operation of the security (*h*).

Personal security.

338. A loan on personal security (*i*) to a person who is not a member of the society is not illegal in the sense that moneys lent on personal security are irrecoverable, but it is a breach

(*b*) Societies' Borrowing Powers Act, 1898 (61 & 62 Vict. c. 15). Under Treasury Authority (16th May, 1876), loan societies may be established "to create funds by monthly or other subscriptions to be lent out to or invested for the members of a society or for their benefit, pursuant to the Friendly Societies Acts." See Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (5); and title LOAN SOCIETIES.

(*c*) *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, C. A., *per* BRETT, L.J., at p. 70.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 46. For form of rules regulating loan funds, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 38, 39. Compare the power to borrow for a like purpose, p. 164, *ante*.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 46 (b).

(*f*) *Ibid.*, s. 46 (d).

(*g*) *Ibid.*, s. 46 (a), (c).

(*h*) *Ibid.*, s. 45. Such a loan would, apparently, not require one or other of the consents mentioned as regards investments in *ibid.*, s. 44; see p. 167, *post*.

(*i*) *I.e.*, on the security of an individual.

SECT. 1. Borrowing and Lending.

of trust (*k*); and the trustees and the society are liable to penalties for making or sanctioning such investment (*l*).

Mortgages. Land Transfer Rules, 1903.

339. A registered society may invest on mortgage (*m*).

Upon the registration at the Land Registry of a charge in favour of a friendly society or branch, the instrument of charge may, if it is so desired, be delivered to it after registration upon delivery at the Land Registry of a copy verified as correct by the secretary. The copy is admissible for all purposes as sufficient evidence of the contents and execution, and need not be stamped, but it must be filed in the Land Registry (*n*). In such a case the instrument of charge must be indorsed with a certificate of registration, and the instrument so indorsed is then treated for all purposes as the certificate of charge. It must be indorsed with notes of transfers, part discharges, and other dealings, and when the charge is wholly discharged must be delivered up, cancelled, and retained in the Land Registry (*o*).

Discharge of mortgages.

340. On payment of moneys secured to a registered society or branch by mortgage (*p*), no reconveyance or surrender is necessary, if a receipt in the statutory form (*q*) is indorsed on or annexed to the mortgage or other assurance (*r*). The receipt, which must be under the hands of the trustees, and counter-signed by the secretary, operates like a reconveyance to revest the legal estate in the person for the time being entitled to the equity of redemption (*s*).

Discharge of registered mortgage.

341. Where the mortgage or other assurance is registered under any Act for the registration or record of deeds or titles, the recording officer must, on production of the statutory receipt, verified by oath, enter satisfaction of the mortgage or charge on the register, and grant a certificate, either upon the mortgage or assurance, or separately, to the like effect (*t*). The certificate will be received as

(*k*) *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, C. A.; see title BUILDING SOCIETIES, Vol. III., p. 364.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 84, 87; *Ludlow* v. *Rylance* (1881), Diprose and Gammon, 123 (police court). See as to investments authorised, p. 167, *post*.

(*m*) See note (*o*), p. 168, *post*. Such a mortgage is not exempt from stamp duty; see p. 161, *ante*.

(*n*) Land Transfer Rules, 1903, r. 121. As to registered charges generally, see title MORTGAGE; as to registration of title, generally, see title REAL PROPERTY AND CHATTELS REAL.

(*o*) Land Transfer Rules, 1903, r. 122.

(*p*) For form of mortgage to a friendly society, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 271.

(*q*) For form of statutory receipt, see *ibid.*, Vol. VI., p. 91, and Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 98 (4), Sched. II., Part III. As to the importance of adhering literally to the statutory form, see *Thomas* v. *Kelly* (1888), 13 App. Cas. 506, 519.

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (1). The similar section in the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42, has been construed by the courts on several occasions, and no doubt such decisions would apply to this sub-section. For cases, see title BUILDING SOCIETIES, Vol. III., pp. 370, 371.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (1); *Carlisle Banking Co.* v. *Thompson* (1884), 28 Ch. D. 398. As to discharge of mortgage securities, generally, see title MORTGAGE.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (2). The fee for entry and certificate is 2*s*. 6*d*. (*ibid.*, s. 53 (4)).

evidence in all courts and proceedings without further proof (*a*). In the case of land registered under the Land Transfer Act, 1875 (*b*), an instrument of discharge in the official form, under the hands and seals of the trustees or other proper officers of the society and attested by the secretary, has, however, the same effect in vacating the mortgage or charge and in vesting the estate and otherwise as a receipt indorsed on the mortgage or charge (*c*).

Discharge of copyhold mortgages.

If a mortgage to a registered society or branch comprising copyholds or lands of customary tenure has been entered upon the court rolls, the steward of the manor or keeper of the register must, on production of the statutory receipt verified by oath, make an entry and grant a certificate to the like effect as is before mentioned with regard to registered mortgages (*d*). The certificate is in like manner evidence without further proof (*e*).

Sale by mortgagee friendly society to member.

342. If a friendly society, being mortgagee, and acting by its investment committee, in exercise of its power of sale, sells to a member of that committee, the onus of proof as to the fairness of the transaction rests on the purchaser (*f*).

Money-lenders Act, 1900.

343. A society registered under the Act of 1896 is exempt from registration as a "money-lender" (*g*).

SECT. 2.—*Investments.*

Provisions for investment.

344. The rules of a registered society must provide for the investment of its funds (*h*). The trustees of a registered society or branch may, with the consent of the committee or of a majority of the members present and entitled to vote in general meeting, invest the whole or a part of the funds of the society or branch in any of the following ways (*i*):—

Authorised securities.

(1) In the Post Office Savings Bank or in any savings bank certified under the Trustee Savings Banks Act, 1863 (*k*); (2) in the public funds; (3) with the National Debt Commissioners, in accordance with the provisions of the Act of 1896 (*l*); (4) in the purchase

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (3).

(*b*) 38 & 39 Vict. c. 87.

(*c*) Land Transfer Rules, 1903, r .167. See Encyclopædia of Forms and Precedents, Vol. XI., p. 416.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (2). The fee for entry and certificate is 2*s*. 6*d*. (*ibid*., s. 53 (4)). As to mortgages of copyholds, generally, see titles COPYHOLDS, Vol. VIII., p. 93; MORTGAGE.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53 (3).

(*f*) *Hodson* v. *Deans*, [1903] 2 Ch. 647. See further as to sales and purchasers by societies, being mortgagees, title BUILDING SOCIETIES, Vol. III., pp. 368, 370.

(*g*) *I.e.*, under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 6 (b), as to which see title MONEY AND MONEY-LENDING.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (5). For form of rule regulating investments, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 37, 38.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 44 (1). As to loans, see p. 165, *ante*.

(*k*) 26 & 27 Vict. c. 87, ss. 33—35; see title BANKERS AND BANKING, Vol. I., pp. 576 *et seq*.

(*l*) 59 & 60 Vict. c. 25, s. 52; and see p. 168, *post*.

SECT. 2 Investments.

of land, or in the erection or alteration of offices or other buildings thereon (*m*); (5) upon any other security expressly directed by the rules, other than personal security, except such loans to members as are authorised by the Act of 1896 (*n*); and (6) in any authorised trustee investment (*o*).

Investment by and for branches.

345. The rules of a society and of its branches may provide for the investment of funds of the society by a branch, and of funds of a branch by the society or another branch, and the consent to such investment must be that of the body by which the investment is made (*p*).

Investment with National Debt Commissioners.

346. Any sum of money not less than £50 declared to belong exclusively to a society or branch may be paid to the account of the National Debt Commissioners at the Bank of England or the Bank of Ireland (*q*). Moneys paid in upon a false declaration are liable to forfeiture, and to be transferred to the sinking fund (*r*). The

Interest.

interest on moneys so invested varies from £4 11*s.* 3*d.* to £2 15*s.* per cent., according to the dates of (1) legal establishment of the society or branch, (2) first investment, and (3) the assurance from which the money arises (*s*). A society or branch which has funds so invested at a rate higher than £2 15*s.* per cent. may retain at that rate only so much of its funds as arises from assurances made before the date applicable to that rate, after deducting all benefit payments and management expenses incurred on account of those assurances (*t*): funds not entitled to be retained at a rate higher than £2 15*s.* per cent. must be either withdrawn or transferred to the lowest rate (*a*), and the Commissioners have power, when all the members of a society or branch assured before 15th August, 1850, have died or ceased to be members, to transfer the investments of that society or branch to the lowest rate (*b*).

Withdrawal.

If a society or branch withdraws any money invested with the Commissioners, it is not entitled, without their consent, to make a further deposit (*c*).

Returns.

A society or branch must furnish, when required, returns of the funds deposited and the assurances to which those funds relate (*d*).

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 47 (1).
(*n*) *Ibid.*, ss. 45, 46; and see p. 165, *ante*. As to a loan on personal security to a non-member, see p. 165, *ante*. As to the meaning of security, see *Re Rayner, Rayner* v. *Rayner*, [1904] 1 Ch. 176, 189, C. A.
(*o*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 4. As to what are authorised trustee securities, see title TRUSTS AND TRUSTEES; and as to investment on mortgage, see p. 166, *ante*.
(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 44 (2).
(*q*) *Ibid.*, s. 52 (1), (2). The provisions of the Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), as to receipts, certificates, and orders apply (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 52 (4)); see Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), ss. 21, 22, 24—28, and title BANKERS AND BANKING, Vol. I., pp. 576—578.
(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 52 (3); Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 12.
(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 52 (5).
(*t*) *Ibid.*, s. 52 (8).
(*a*) *Ibid.*
(*b*) *Ibid.*, s. 52 (9).
(*c*) *Ibid.*, s. 52 (6).
(*d*) *Ibid.*, s. 52 (7).

347. A registered friendly society may have deposits in more than one savings bank in the United Kingdom, and deposits standing to more than one account in the same savings bank (*e*). Deposits in savings banks.

SECT. 3.—*Power to hold Land.*

348. Where the rules so provide, a registered society or branch (*f*) may (1) hold, purchase, or take on lease, in the names of the trustees of the society or branch, land of any tenure, and any interest in land (*g*); (2) sell, exchange, mortgage, lease, or build upon that land, with power to alter and pull down buildings and again rebuild (*h*). Purchasers, assignees, mortgagees, or tenants are not bound to inquire as to the authority for any sale, exchange, mortgage, or lease by the trustees, and the receipt of the trustees is a discharge for all sums of money arising from or in connection with any such transaction (*i*). Benevolent societies may not hold land exceeding one acre (*k*). Power to hold land.

349. Where a registered society or branch is entitled to copyholds or customary freeholds, either absolutely or by way of mortgage, it may require the lord of the manor to admit as tenants at least three trustees of the society or branch, on payment of the fines payable on the admission of a single tenant (*l*). Copyholds.

SECT. 4.—*Vesting, Devolution, and Recovery of Property.*

350. All property (*m*) belonging to a registered society, whether acquired before or after the society is registered, vests in the trustees for the time being of the society for the benefit of the society and the members according to the rules (*n*). Vesting of property of registered society.

The property of a registered branch vests wholly or partly in the trustees for the time being of that branch, or of any other branch of which that branch forms part, or, if the rules of the society so provide, in the trustees of the society. In the latter case the rules of the society should provide whether the property is to be held for the benefit of the members of the branch or of the members of the society generally (*o*). Vesting of property of branch.

(*e*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 12; see also title BANKERS AND BANKING, Vol. I., pp. 576—578.

(*f*) For these purposes a branch of a registered society need not be separately registered (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 47 (2)).

(*g*) *Ibid.*, ss. 47 (1), 106; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; compare the power to invest in the purchase of land given by s. 44 of the Act of 1896, which, however, having regard to *ibid.*, s. 47 (1), would seem to be exercisable only where authorised by rules; and see pp. 167, 168, *ante*. For restrictions on the holding of land by charitable bodies, see title CHARITIES, Vol. IV., pp. 124 *et seq.*

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 47 (1).

(*i*) *Ibid.*

(*k*) *Ibid.*, s. 47 (3).

(*l*) *Ibid.*, s. 48.

(*m*) Including realty and personalty, books and papers (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106).

(*n*) *Ibid.*, s. 49 (1); *Yeates* v. *Roberts* (1855), 7 De G. M. & G. 227, C. A.; *Sharp* v. *Warren* (1818), 6 Price, 131; *Oldham Our Lady's Sick and Burial Society* v. *Taylor* (1887), 3 T. L. R. 472, C. A.; compare *Davies* v. *Griffiths* (1853), 1 W. R. 402. As to gifts by will to friendly societies tending to perpetuities, see title CHARITIES, Vol. IV., p. 119.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 49 (2).

SECT. 4. **Vesting, Devolution, and Recovery of Property.**

Devolution on death, resignation or removal of trustee.

351. Upon the death, resignation, or removal of a trustee of a registered society or branch, the property vested in him vests in the succeeding trustees, either solely or with any surviving or continuing trustees, and, until the appointment of succeeding trustees, in the surviving or continuing trustees only, or in the executors or administrators of the last surviving or continuing trustee. The property, whether real or personal, vests as personal estate and subject to the same trusts. No conveyance or assignment is required, except in the case of stocks and securities in the public funds of Great Britain and Ireland, which must be transferred (*p*).

Transfer of stock by direction of registrar.

352. When a trustee or former trustee, appointed either before or after registry of a society or branch (*q*), is absent from the British Islands (*r*), bankrupt, lunatic, or dead, or has been removed from the office of trustee, or when it is unknown whether such a trustee is living or dead, the registrar may, on application in writing (*s*) from the secretary and three members of a registered society or branch, direct a transfer of stock transferable at the Bank of England or Ireland which is vested in him either jointly with another or others or solely. Such transfer is made by the surviving or continuing trustees, or, if the registrar so directs, by the Accountant-General or his deputy (*a*).

Legal proceedings.

353. In all legal proceedings concerning property vested in the trustees of a registered society or branch, the property may be stated to be the property of the trustees in their proper names as trustees for the society or branch without further description (*b*).

Misapplication of property.

354. When property of a registered society or branch is improperly withheld, or has been misapplied, an order may be obtained in a court of summary jurisdiction for delivery up or repayment, as the case may be, and, when fraud is proved, punishment by fine or imprisonment may be imposed (*c*).

SECT. 5.—*Subscriptions to other Societies and Institutions.*

Subscriptions to hospitals.

355. A registered society or branch may subscribe out of its funds to any hospital, infirmary, or charitable or provident

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 50. See, further, the cases on a similar section of an Act affecting building societies, title BUILDING SOCIETIES, Vol. III., pp. 347, 348. As to funds in the hands of a treasurer of a friendly society being held *virtute officii*, see *Re Woodliffe, Ex parte Ray* (1839), 3 Deac. 537.

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 34 (1).

(*r*) *I.e.*, the United Kingdom, the Channel Islands, and the Isle of Man (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (1)).

(*s*) For forms of application to the registrar to order a transfer of stock to new trustees, or of statutory declaration verifying such application, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 75, 77; Treasury Regulations, 1897 (21)—(24); and see *Re a Friendly Society* (1822), 1 Sim. & St. 82.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 34 (1), (2). The banks are indemnified for anything done by them under the direction of the registrar (*ibid.*, s. 34 (3)).

(*b*) *I bid.*, s. 51; *R.* v. *Marks* (1866), 10 Cox, C. C. 367; and see p. 190, *post*.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (3); *R.* v. *Bennett and Ward* (1894), 63 L. J. (M. C.) 181; and see p. 186, *post*. As to the construction of a bond given by a publican to hand over when required a box belonging to a society, see *Wybergh* v. *Ainley* (1824), M'Cle. 669.

institution, any sum which may be necessary to secure, according to its rules, the benefits of such institution to members of the society or branch and their families (*d*).

SECT. 5. Subscriptions to other Societies and Institutions.

Contributions to other societies.

356. A registered society or branch, if its rules so provide, may contribute to the funds and take part in the government of any other registered society or registered branch, without thereby becoming a branch of the other society or branch (*e*). Such a contributing society does not become "a member or person claiming under the rules" of the other society, so that disputes between the two societies can be submitted to arbitration according to the rules of the latter (*f*). A registered society may not withdraw from contributing to the funds of a medical society (*g*), except on three months' notice to the latter society, and on payment of all contributions to the date when the notice expires (*h*). Compulsory levies for political purposes would be illegal (*i*).

Part X.—Quinquennial Valuations.

Quinquennial valuations.

357. Every registered society or branch, with the exceptions mentioned below, must, once at least in every five years, have its assets and liabilities valued (*k*).

Valuer's report.

Returns to registrar.

358. For the purpose of the valuation the society or branch must either cause its assets and liabilities to be valued by a valuer appointed by the society or branch, and send to the registrar his report, or send to the registrar a return of the benefits assured and contributions receivable from all the members of the society or branch, and of all its funds and effects, debts and credits, accompanied by such evidence as the registrar prescribes (*l*).

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 37.

(*e*) *Ibid.*, s. 22 (1). This section is applicable in the case of registered trade unions contributing to medical societies (*ibid.*, s. 22 (2); see title TRADE AND TRADE UNIONS).

(*f*) *Snell* v. *Vine* (1890), Diprose and Gammon, 313.

(*g*) *I.e.*, "a society for the purpose of relief in sickness by providing medical attendance and medicine" (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 22 (2)).

(*h*) *Ibid.*, s. 22 (3).

(*i*) *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 28 (1). The rules should provide for this valuation (*ibid.*, Sched. I. (11)). The provisions for quinquennial valuations do not apply to benevolent societies, working men's clubs, or cattle insurance societies, and their branches; nor are they applicable to a specially authorised society or branch unless directions to that effect are contained in the authority for registering such society or branch (*ibid.*, s. 28 (4)). A fee of £2 is payable (Treasury Regulations (70) B). Further, the Chief Registrar may, with the approval of the Treasury, dispense with the provisions for quinquennial valuations in the case of societies or branches where he deems such provisions inapplicable owing to the nature of their operations (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 28 (5)).

(*l*) *Ibid.*, s. 28 (1); *Friendly Societies* (*Registrar*) v. *Noden* (1881), Diprose and Gammon, 430. A valuation by the person who audited the accounts

PART X. Quinquennial Valuations.

If the first alternative is adopted the report (*m*) must be signed by the valuer, whose address and profession must be stated, and must contain an abstract (*n*) made by the valuer of the results of the valuation, and such information concerning the benefits assured and the contributions receivable by the society or branch, and of its funds and effects, debts and credits, as the registrar may require (*o*). If the second alternative is adopted, the registrar must cause the assets and liabilities of the society or branch to be valued and reported on by an actuary, and must send to the society or branch a copy of the report and an abstract of the results of the valuation (*p*).

Valuation of society with branches.

In the case of a society with branches the valuation must include all funds under the control of the central body (*q*). A registered branch, in respect of the valuation of funds administered by itself, or by a committee or officers appointed by itself, is subject to the same obligations as if it were a registered society; it is also liable, with its officers and committee, to similar penalties (*r*).

Power of Treasury to appoint valuers.

359. For the purpose of valuations the Treasury may appoint valuers, and determine the remuneration payable by societies and branches for their services, but the employment of these valuers is not compulsory (*a*).

Copy to be hung up.

360. Every registered society and branch must keep a copy of the last quinquennial valuation, together with any special report of the auditors, always hung up in a conspicuous place at the registered office of the society or branch (*b*).

in the year preceding the valuation will not be accepted (Treasury Regulations, 1897 (18)).

(*m*) For form of report, see Encyclopædia of Forms and Precedents, Vol. VI., p. 94.

(*n*) An official form of the abstract to be made either by one of the public valuers, or a valuer appointed by the society, is set out in Baden Fuller, Friendly Societies and Industrial and Provident Societies, 3rd ed., Appendix, Part II., pp. 354—365. It is the form at present prescribed by the Chief Registrar, and its use is compulsory (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 98 (3)).

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 28 (2).

(*p*) *I bid.*, s. 28 (3).

(*q*) Treasury Regulations, 1897 (17).

(*r*) *I bid.*; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 28. As to penalties, see p. 184, *post*.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 30 (1). Instructions subject to yearly revision by the Treasury are issued by the Treasury explaining the status and duties etc. of valuers; for such instructions, see Baden Fuller, Friendly Societies and Industrial and Provident Societies, 3rd ed., Appendix, Part II., pp. 354 *et seq.* The fee under the authorised scale varies from £10, where the number of members does not exceed 150, to £55, where the number does not exceed 1,000, with an additional £25 for every 500 members, or portion thereof, beyond 1,000. Where the number exceeds 2,500 a special fee is fixed by the Chief Registrar (Treasury Regulations, 1897 (19)). The Treasury may also remunerate valuers out of moneys to be provided by Parliament (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 30 (2)).

(*b*) *I bid.*, s. 29.

Part XI.—Accounts and Inspection of Affairs.

SECT. 1.—*Accounts.*

SECT. 1. **Accounts.**

361. The rules of every registered friendly society and branch must provide for accounts being kept and audited once a year at least (*c*), and, in the case of every friendly and cattle insurance society, for separate accounts being kept of moneys received or paid on account of every particular fund or benefit assured for which a separate table of contributions has been adopted, and of the expenses of management, and of all contributions on account thereof (*d*). These accounts are of two sorts—(1) those rendered to the society by its officers (*e*), and (2) those rendered by a society to its members (*f*). Statutory liability to keep accounts.

362. The accounts of the society must be audited either by one of the public auditors appointed by the Treasury (*g*), or by two or more persons appointed according to the rules of the society or branch (*h*). Accounts duly audited and signed may be impeached on grounds of fraud, but not of honest error (*i*). Auditors.

363. Every registered society and branch must send to the registrar once a year, not later than 31st May, a return of the receipts and expenditure, funds, and effects of the society or branch as audited, and also of the number of members (*k*). Where the society has branches, the annual returns must include all the registered branches (*l*). The annual return must (1) show separately the expenditure in respect of the several objects of the society or branch; (2) be made out to 31st December then last; and (3) state Annual returns. Contents.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 26 (1), Sched. I. (5); see Encyclopædia of Forms and Precedents, Vol. VI., pp. 35, 36. The Central Office may prepare and compel the use of model forms of accounts (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 2 (2)), but it has not as yet availed itself of this power.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (10).

(*e*) *Ibid.*, s. 55. As to the liability of persons receiving subscriptions from members of a slate club to account, see *Re One and All Sickness and Accident Assurance Association* (1909), 25 T. L. R. 674.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 26—30.

(*g*) *Ibid.*, s. 30. For the conditions prescribed by the Treasury under which public auditors hold their appointments, and for the authorised rates of remuneration, see Baden Fuller, Friendly Societies and Industrial and Provident Societies, 3rd ed., Appendix, Part I., pp. 349 *et seq.*

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 26 (1); as to their powers and duties, see *ibid.*, s. 26 (2). For form of special report of auditors when accounts are incorrect, see Encyclopædia of Forms and Precedents, Vol. VI., p. 86.

(*i*) *Holgate* v. *Shutt* (1884), 28 Ch. D. 111, C. A., a building society case, where, however, it was held that the accounts had not been duly audited in accordance with the statute and the rules; see S. C., Diprose and Gammon, 2.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 27 (1), Sched. I. (6). For form of annual return (official form AR1), see Encyclopædia of Forms and Precedents, Vol. VI., p. 80. None other may be used. For official form of certificate of auditors, see *ibid.*, p. 86.

(*l*) Treasury Regulations, 1897 (17).

SECT. 1. **Accounts.**

Branch.

by whom the audit has been conducted (*m*). With the return must be sent a copy of any special report of the auditors (*n*). In the case of a branch, the annual return must be sent to the registrar through an officer appointed for that purpose by the parent society (*o*).

Collecting society.

In the case of a collecting society, the annual return must be certified by a public accountant, not an officer of the society, otherwise than as its auditor (*p*).

Balance sheet.

364. Every registered society and branch must keep a copy of the last annual balance sheet, with any special report of the auditors, always hung up in a conspicuous place in its registered office (*q*). The balance sheet of a collecting society must be kept open for inspection at all the business offices of the society for seven days next preceding the meeting at which it is to be presented, and must be delivered or sent to every member on demand (*r*).

Right of inspection of books.

365. Any member or person having an interest in the funds of a registered society or branch may inspect and take copies (*s*) of the books (*t*). But only officers or members or persons specially authorised by a resolution of the society or branch are entitled to inspect the loan account of any other member without his written consent (*a*).

SECT. 2.—*Inspection of Affairs.*

Inspection of affairs.

366. The Chief Registrar may, with the consent of the Treasury on the application of one-fifth of the members of a registered society, or of 100 if there are from 1,000 to 10,000 members, or of 500 where there are more than 10,000 members (*b*), appoint an inspector to examine into and report on the affairs of the society (*c*). This provision does not apply to a society with branches, except

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 27 (2). If the audit has been made by a person other than the public auditor, the name, address, profession, and particulars of appointment of such auditor must be stated (*ibid.*).

(*n*) *Ibid.*, s. 27 (3). For form of special report of auditors, see Encyclopædia of Forms and Precedents, Vol. VI., p. 86.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 27 (4). For rules of a branch respecting annual returns, see Encyclopædia of Forms and Precedents, Vol. VI., p. 43; see also Treasury Regulations, 1897 (17).

(*p*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 6 (2).

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 29.

(*r*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 6 (1). As to meetings, see p. 158, *ante*.

(*s*) See *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 40. The right extends to collecting books (*Moffatt* v. *Taunton* (1891), Diprose and Gammon, 307). Refusal of the right of inspection is an offence under the Act (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84). As to rights of members, generally, see p. 148, *ante*.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 40.

(*b*) The registrar may immediately upon receipt of the application transmit one copy to the Treasury for their consent, or may before such transmission give notice of the application to the society, and send to the Treasury any answer the society may make (Treasury Regulations, 1897 (49)).

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (1); see *Professional and Civil Service Supply Association* v. *Dougal* (1898), 5 Scots Law Times, 359. For

SECT. 2. Inspection of Affairs.

with the consent of the central body (*d*). It does, however, apply to a collecting society, registered or unregistered, and in the case of such a society with branches the consent of the central body is not necessary (*e*).

Procedure.

A member may issue a circular among his fellow members for the purpose of getting sufficient signatures to such an application; but inaccurate statements as to the financial condition of the society may be restrained by injunction (*f*).

Evidence.

The application must be supported by evidence that there is good reason for an inspection, and that the applicants are not actuated by malicious motives, and such notice must be given to the society as the Chief Registrar directs (*g*).

Powers of inspector.

367. The inspector may require the production of all books and documents belonging to the society, and may examine on oath its officers, members, agents, and servants (*h*). A document purporting to be signed by an inspector is, in the absence of any evidence to the contrary, receivable in evidence without proof of the signature (*i*).

Costs.

The registrar may, before appointing an inspector, require the applicants to give security for the costs of the proposed inspection (*k*), and he may direct the costs to be paid by the applicants, or the society, or by the present or former members or officers (*l*).

Part XII.—Settlement of Disputes.

SECT. 1.—*In General.*

Construction of Acts.

368. In construing the Friendly Societies Acts the substance of the procedure is to be regarded, not technicalities (*m*).

Provisions for settlement of disputes.

369. Every society registered under the Act of 1896 must by its rules determine the manner in which disputes are to be settled (*n*). When a direction on this point is contained in the rules, certain disputes, including all those most likely to arise, must

application for appointment of inspectors and of statutory declaration to accompany it, see Treasury Regulations, 1897 (48), Forms AD and AE; Encyclopædia of Forms and Precedents, Vol. VI., pp. 88, 89. The appointment of inspectors is in Form AF, or as near thereto as possible (Treasury Regulations, 1897 (50)). A fee of £1 is payable for appointment of inspectors (*ibid.* (70)).

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (7).

(*e*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 12.

(*f*) *Hill* v. *Hart Davies* (1882), 21 Ch. D. 798. As to procedure on an application for injunction, see title INJUNCTION.

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 76 (2).

(*h*) *Ibid.*, s. 76 (5). It is an offence under the Act for a society to refuse to produce books or furnish information required by an inspector (*ibid.*, s. 84). As to offences and penalties generally, see p. 184, *post*.

(*i*) *Ibid.*, s. 100.

(*k*) *Ibid.*, s. 76 (3).

(*l*) *Ibid.*, s. 76 (4). Failure to pay such costs, when directed by the registrar, is an offence under the Act (*ibid.*, s. 84). As to offences and penalties generally, see p. 184, *post*. For similar provisions in the case of application for a meeting of the society, see p. 159, *ante*.

(*m*) *Re Sheffield Order of Druids Society* (1892), 56 J. P. 613.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3), Sched. I. (8); see Encyclopædia of Forms and Precedents, Vol. VI., pp. 41, 52.

SECT. 1. In General.

be decided in the manner directed (*o*), and any decision so given will be binding and conclusive (*p*), even if erroneous in point of law and unfair (*q*). The tribunals provided are usually arbitrators (*r*) or justices (*s*).

References.

The parties to a dispute in a registered society may also by consent, unless forbidden by the rules, refer the dispute to the Chief Registrar (*t*), and where the rules direct a reference to justices may, by consent, refer the dispute to the county court (*u*). Where the rules contain no directions as to disputes, or no decision is made within forty days after application for a reference, the aggrieved party may apply to the county court or a court of summary jurisdiction (*v*).

Special cases.

The special means of settling disputes conferred by the Act of 1896 (*w*) apply only to disputes affecting registered societies or branches falling within one of the classes enumerated in the Act (*x*).

Classes of disputes.

370. The disputes which must be decided in manner directed by the rules are the following:—

(1) Disputes between a member or person claiming through a member (*y*) or under the rules of a registered society or branch and the society or branch or any of its officers (*a*). The dispute must, it is apprehended, have relation to the membership of the member or person claiming through a member (*b*), as, for example, disputes relating to the distribution of a fund in the hands of trustees of a friendly society (*c*), a claim for sick pay (*d*), or funeral money (*e*), the construction of rules (*f*), the propriety of convening a special meeting for the purpose of amending rules (*g*), the right of a person to be or to

(*o*) See *Reeves* v. *White* (1852), 17 Q. B. 995.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (1); and see p. 178, *post*.

(*q*) *Catt* v. *Wood*, [1910] A. C. 404; *secus*, if misconduct is alleged and proved (*ibid.*; and see *Andrews* v. *Mitchell*, [1905] A. C. 78, 82); *M'Kernan* v. *Greenock Lodge of United Operative Masons' Association* (1873), 11 Macph. (Ct. of Sess.) 548.

(*r*) See p. 179, *post*.

(*s*) See p. 182, *post*. As to Scottish tribunals, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 102, and as to jurisdiction of the English courts in such cases, see *Re Brodie* v. *Johnson* (1861), 30 Beav. 129.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (2); and see p. 183, *post*.

(*u*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (5); and see p. 180, *post*.

(*v*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6); and see pp. 180, 182, *post*. As to courts of summary jurisdiction, see title MAGISTRATES.

(*w*) 59 & 60 Vict. c. 25, s. 68.

(*x*) *Ibid.* As to these classes, see p. 123, *ante*.

(*y*) Including nominees when nomination is allowed (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106).

(*a*) *Ibid.*, s. 68 (1) (a).

(*b*) *Lewis* v. *Paulton* (1907), 15 Scots Law Times, 818; see *Morrison* v. *Glover* (1849), 4 Exch. 430; and compare Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (8), as to past members.

(*c*) *Grinham* v. *Card* (1852), 7 Exch. 833.

(*d*) *Re Hogg, Ex parte Parkin* (1898), 14 T. L. R. 210.

(*e*) *R.* v. *Dublin Justices* (1891), 28 L. R. Ir. 516.

(*f*) *Ex parte Payne* (1849), 5 Dow. & L. 679; *Trott* v *Hughes* (1850), 16 L. T. (o. s.) 260; *Stone* v. *Liverpool Marine Society* (1894), 63 L. J. (Q. B.) 471; *Cox* v. *Hutchinson*, [1910] 1 Ch. 513.

(*g*) *Hoey* v. *M'Farlane* (1858), 4 C. B. (N. S.) 718.

continue to be a member (*h*), as to the conduct of an officer (*i*), or the repayment of money deposited by a member (*j*). Disputes between a society and a member not in his capacity as member—*e.g.*, a claim by a society against one of its officers for misappropriation of funds (*k*), or as to the title of the administrator of a deceased member to represent the member (*l*)—are not disputes to which the Act applies, and consequently they are determinable by ordinary legal methods (*m*).

(2) Disputes between any person aggrieved who has ceased to be a member of a registered society or branch, or between any person claiming through such aggrieved person, and the society or branch or any of its officers (*n*), where such dispute arose while he was a member, or arises out of his previous relation as a member.

(3) Disputes as to whether a member or person aggrieved is entitled to be or continue to be a member or to be reinstated as a member (*o*).

(4) Disputes between any registered branch of any society or branch and the parent society or branch, or between an officer of any registered branch and the parent society or branch, or between any two or more registered branches of any society or branch or any officers thereof respectively (*p*).

Jurisdiction of ordinary tribunals.

371. If the matter in difference is a dispute coming within any of the above-mentioned classes, the ordinary tribunals have no jurisdiction to deal with it in the first instance (*q*).

Decision of arbitration committee.

If an arbitration committee of a friendly society established for compensating workmen for accidents is not entitled under the rules conclusively to decide a dispute as to the ability of injured workmen

(*h*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 6.

(*i*) *Glasgow District of Ancient Order of Foresters* v. *Stevenson* (1899), 37 Sc. L. R. 12.

(*j*) *Melrose* v. *Adams* (1897), 34 Sc. L. R. 346.

(*k*) *Sinden* v. *Banks* (1861), 3 E. & E. 623.

(*l*) *Symington's Executor* v. *Galashiels Co-operative Store Co., Ltd.* (1894), 21 R. (Ct. of Sess.) 371; compare *Kelsall* v. *Tyler* (1856), 11 Exch. 513.

(*m*) For other cases, see title BUILDING SOCIETIES, Vol. III., p. 387, the same principle being applicable.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (1) (b), (8); Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 6. This does not mean that the court has no jurisdiction in the case of a dispute between a society and the administrator of a deceased member as to the right of the administrator to represent the member (*Symington's Executor* v. *Galashiels Co-operative Store Co., Ltd.*, *supra*). See also *Blue* v. *West Kilbride Free Gardeners' Society* (1866), 4 Macph. (Ct. of Sess.) 1042; *Gall* v. *Loyal Glenbogie Lodge* (1900), 37 Sc. L. R. 911.

(*o*) Friendly Societies Act, 1908 (8 Edw. 7, c 32), s. 6.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (1) (c).

(*q*) *Crisp* v. *Bunbury* (1832), 8 Bing. 394; *Reeves* v. *White* (1852), 17 Q. B. 995; *Grinham* v. *Card* (1852), 7 Exch. 833; *Ex parte Payne* (1849), 5 Dow. & L. 679; *Fleming* v. *Self* (1854), Kay, 518; *Re Denton* v. *Marshall* (1863), 1 H. & C. 654; *Bushell* v. *Smith* (1891), *Times*, 12th June; *Stone* v. *Liverpool Marine Society* (1894), 63 L. J. (Q. B.) 471; *M'Caffrey* v. *M'Mahon* (1901), 35 I. L. T. 97; see also *Mulkern* v. *Lord* (1879), 4 App. Cas. 182 (a building society case), where it was laid down that the burden of showing that the ordinary right of maintaining an action is lost is on the party denying such right. Where the rules contain directions as to the disputes, this provision ousts the jurisdiction of the courts which existed previously; see *Palliser* v. *Dale*, [1897] 1 Q. B. 257, C. A.; *Willis* v. *Wells*, [1892] 2 Q. B. 225; *Prentice* v. *London* (1875), L. R. 10 C. P. 679.

SECT. 1. In General.

to resume work, the question may be submitted to the ordinary tribunals (*r*).

Effect of decisions.

372. A decision given in accordance with provisions in the rules as to disputes is conclusive and binding on all parties, and cannot be appealed from, removed into any court of law, or restrained by injunction (*s*). Moreover, it is binding in spite of absence of jurisdiction or irregularity in making the order if the parties have acquiesced in the irregularity or want of jurisdiction (*t*); but a decision given by an arbitration committee without jurisdiction, the rules having been disregarded on a question of substance, is void (*a*).

Collecting societies.

373. A dispute between a collecting society and its members may be determined, on the application of a member, notwithstanding any rule of the society to the contrary, by the county court or the court of summary jurisdiction of the place where the member or witness resides, according to the provisions of the Act of 1896 (*b*). This jurisdiction, being permissive, does not exclude the jurisdiction of the High Court (*c*), unless the latter is expressly excluded by the rules (*d*).

Unregistered societies.

374. A dispute between an unregistered society and its members is not determinable in the cheap and expeditious way provided by the Act of 1896 (*e*), which applies only to registered societies, unless the society falls within the classes of societies to which the Collecting Societies and Industrial Assurance Companies Act, 1896, applies (*f*). It seems that the deposit of the rules of an unregistered friendly society for purposes of registration after the dispute has arisen would not bring the dispute within the scope of the Act of 1896 (*g*).

(*r*) *Haworth* v. *Knowles* (*Andrew*) *& Sons, Ltd. Accident Society* (1903), 19 T. L. R. 658, C. A.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (1); *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891), 64 L. T. 775 (appeal to High Court to set aside decision of arbitrators dismissed); *Crichton* v. *Dalry Myrtle Lodge of Free Gardeners Friendly Society* (1904), 6 F. (Ct. of Sess.) 398; *Catt* v. *Wood*, [1910] A. C. 404.

(*t*) *R.* v. *Evans* (1854), 3 E. & B. 363 (acquiescence in irregular appointment of arbitrators); *Pike* v. *Carter* (1825), 10 Moore (C. P.), 376; *R.* v. *West London Philanthropic Burial Society* (1869), 33 J. P. 614 (acquiescence in jurisdiction of justices).

(*a*) *Andrews* v. *Mitchell*, [1905] A. C. 78, where the decision was given without notice to the member, as required by the rules.

(*b*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 7; see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68. This provision applies to both registered and unregistered societies or companies (Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 1); compare *Knowles* v. *Booth* (1883), 32 W. R. 432.

(*c*) See *Re Royal Liver Friendly Society* (1887), 35 Ch. D. 332.

(*d*) See *Re Royal Liver Friendly Society* (1895), *Times*, 16th November.

(*e*) 59 & 60 Vict. c. 25, s. 68. This section refers only to registered societies and branches. Consequently disputes between unregistered societies and their members must be determined by the ordinary legal methods.

(*f*) 59 & 60 Vict. c. 26, s. 7; and see p. 128, *ante*; compare *Knowles* v. *Booth*, *supra* (decided under a repealed Act).

(*g*) *Smith* v. *Pryse* (1857), 7 E. & B. 339.

SECT. 2.—*By Arbitration* (*h*).

SECT. 2. By Arbitration.

Arbitration.

375. Where the rules of a society direct disputes to be referred to arbitration, arbitrators must be named and elected in the manner provided by the rules (*i*). If the society neglects to appoint arbitrators in accordance with the rules, it may be compelled to do so by mandamus (*k*); but probably, in such case, it would be simpler to settle the dispute by applying to the county court or to a court of summary jurisdiction (*l*).

Application of Arbitration Act, 1889.

376. The provisions of the Arbitration Act, 1889, apply to arbitrations where the reference is made under the rules of a friendly society, so far as such provisions are consistent with the Acts regulating friendly societies, or with any rules or procedure authorised or recognised by such Acts (*m*).

Stating special case.

377. The arbitrator or umpire to whom a dispute is referred under the rules of a registered society or branch cannot be compelled to state a special case on any question of law, but he may, at the request of either party, state a case for the opinion of the High Court (*n*). The law with regard to unregistered societies differs in that arbitrators not only may, but can be compelled to, state a case (*o*).

Hearing counsel.

Arbitrators under the Act of 1896 may decline to hear counsel (*p*).

Costs.

A member of a friendly society claiming sick pay on behalf of his lunatic son, also a member, may be ordered by the arbitration committee of the society to pay the costs of a dispute as to the amount of such sick pay, under a rule empowering the committee to order either party to a dispute to pay costs (*q*).

(*h*) As to jurisdiction, see p. 177, *ante*, and pp. 180, 181, *post*; *Willis* v. *New Union Society* (1892), 8 T. L. R. 653; *Dugan* v. *Ancient Shepherds* (*Lodge*) (1898), 33 I. L. T. 14.

(*i*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 41; and title BUILDING SOCIETIES, Vol. III., p. 381. For the principles applicable to arbitration generally, see title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*k*) See *Norton* v. *Counties Conservative Permanent Benefit Building Society*, [1895] 1 Q. B. 246, C. A.; *Ex parte Young* (1896), 40 Sol. Jo. 338; and title BUILDING SOCIETIES, Vol. III., p. 382, note (*n*). As to appointing an arbitrator in a dispute in regard to a deposit in a savings bank, see *R.* v. *Witham Savings Bank* (*Managers*) (1834), 1 Ad. & El. 416.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6); see also pp. 180, 182, *post*. As to procedure where rules direct reference to arbitration but not for appointment of arbitrators, see *Galashiels Provident Building Society* v. *Newlands* (1893), 30 Sc. L. R. 730.

(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24; and see, generally, title ARBITRATION, Vol. I., pp. 437 *et seq.* As to what is sufficient notice to proceed, see *Hilton* v. *Hill* (1863), 9 L. T. 383. The express or implied assent of members to the rules of a society would, it seems, amount to a submission to arbitration within the meaning of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 24, 27; see *Baker* v. *Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q. B. 144.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (7), nullifying, on this point, the decision in *Tabernacle Permanent Building Society* v. *Knight*, [1892] A. C. 298; Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19.

(*o*) *Ibid.*, s. 19; compare *Tabernacle Permanent Building Society* v. *Knight*, *supra*. As to appeal from opinion expressed by the court on a case stated, see title ARBITRATION, Vol. I., p. 464.

(*p*) *Re Macqueen and the Nottingham Caledonian Society* (1861), 9 C. B. (N. S.) 793; and see title BARRISTERS, Vol. II., p. 376.

(*q*) *Catt* v. *Wood*, [1908] 2 K. B. 458, C. A.; affirmed, [1910] A. C. 404.

SECT. 2. By Arbitration.

Enforcement of award.

378. Application for the enforcement of an award alleged to have been made in accordance with the rules of a society or branch may be made to the county court (*r*); but a member may, if the rules so provide, be suspended by the society for non-compliance with an award without any application to the county court (*s*).

SECT. 3.—*By County Court.*

Application to county court.

379. Application to the county court (*t*) to hear or determine a dispute may be made as a matter of right by a member of a registered society or branch or a person aggrieved (*a*) in two cases—

(1) Where the rules contain no direction as to disputes, and

(2) Where no decision is made on a dispute within forty days after application to the society or branch for a reference under its rules (*b*).

This jurisdiction is permissive only, and does not exclude the jurisdiction of the High Court, and in a proper case an action commenced in the county court against a friendly society by one of its members may be removed by *certiorari* to the High Court (*c*).

Limits of jurisdiction.

380. In proceedings for enforcing an award, the county court is the proper tribunal to determine, in the first instance, whether the dispute is one to be decided in accordance with the rules of the society (*d*). If the county court decides a question of this character contrary to the facts or corruptly, the High Court may interfere (*e*), but it cannot grant prohibition before the matter has come before the county court (*f*). Where facts are in dispute (*g*), and the rules of

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (1). See *Leeds District of the Grand United Order of Oddfellows* (*Trustees*) v. *Mountain Flower Lodge* (1891), Diprose and Gammon, 22; *Wilson* v. *Alfred* (1892), Diprose and Gammon, 23; *Copson* v. *Armsby* (1877), Diprose and Gammon, 383.

(*s*) *Catt* v. *Wood*, [1908] 2 K. B. 458, C. A.; affirmed, [1910] A. C. 404.

(*t*) As to the proper county court to which application should be made, see *Shea* v. *United Assurance Society of St. Patrick* (1867), L. R. 3 C. P. 21.

(*a*) Trustees who are not members would seem not to be persons "aggrieved" by an alteration of the rules; see *Hull* v. *McFarlane* (1857), 2 C. B. (N. S.) 796.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6). Apart from this sub-section the parties would have to resort to the High Court (*Wilkinson* v. *Jagger* (1887), 20 Q. B. D. 423, *per* WILLS, J.); see *R.* v. *Catley* (1887), 19 Q. B. D. 491 (appeal to general committee of society by member expelled by branch committee, and no decision within forty days); *Re Thomas, R.* v. *Shropshire County Court Judge* (1887), 3 T. L. R. 526 (failure by society to hold meeting within forty days, as provided by the rules, to adjudicate upon a claim); *Ex parte Wooldridge* (1862), 1 B. & S. 844 (reinstatement of expelled member); *Critchlow* v. *Bellis* (1893), Diprose and Gammon, 37 (award improperly procured, and therefore void).

(*c*) *Re Royal Liver Friendly Society* (1887), 35 Ch. D. 332; *Tiplady* v. *Royal Liver Friendly Society* (1887), 3 T. L. R. 697. The High Court would decline to entertain the application for *certiorari*, if it were made from improper reasons, *e.g.*, for purposes of procrastination (*ibid.*); see *Critchlow* v. *Bellis*, *supra*, where the High Court refused to interfere in the case of an award alleged to be improperly procured. As to proceedings by *certiorari*, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

(*d*) *Re Skipton Industrial Co-operative Society, Ltd.* v. *Prince* (1864), 33 L. J. (Q. B.) 323.

(*e*) *Armitage* v. *Walker* (1855), 2 K. & J. 211; *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891), 64 L. T. 775. See *Schofield* v. *Vause* (1886), 36 W. R. 170, n., C. A. (appeal from Palatine Court to Court of Appeal).

(*f*) *Re Skipton Industrial Co-operative Society, Ltd.* v. *Prince*, *supra*.

(*g*) *Re Hogg, Ex parte Parkin* (1898), 14 T. L. R. 210 (claim for sick pay); *Tanner* v. *Surrey Lodge Manchester Unity Independent Order of Oddfellows*

SECT. 3. By County Court

the society or branch concerned provide for disputes being referred to arbitration, the county court has no jurisdiction in the first instance (*h*). If that court assumes jurisdiction, it is within the discretion of the High Court to grant prohibition (*i*). The county court has no jurisdiction to enforce an award between two societies (*k*).

Jurisdiction by consent.

381. Where the rules of a registered society or branch direct that disputes shall be referred to justices, the dispute may, if the parties thereto consent, be determined by the county court (*l*).

Form of application.

382. Application to the county court where the dispute is between a friendly society and its members should be made by plaint and summons in the ordinary way, the aggrieved member being plaintiff and the society being defendant (*m*). Such an application (*n*) is not a reference to the county court judge acting as arbitrator, and therefore his decision is subject to appeal in the ordinary way by motion to the High Court (*o*). The county court may also, at the request of either party, state a case for the opinion of the High Court (*p*). In the case of a dispute as to the right of a branch to secede, it is the duty of the county court judge to receive evidence of secession (*q*).

Appeal.

Case stated.

Right to secede.

(1890), Diprose and Gammon, 252 (reinstatement of expelled member); *Tinsley* v. *Farmers Glory Lodge of Oddfellows* (1884), Diprose and Gammon, 252; *Diggle* v. *Rose Lodge Manchester Unity Independent Order of Oddfellows* (1889), Diprose and Gammon, 300 (claims of representatives of deceased expelled members for funeral money).

(*h*) *Grimsby District of the Ancient Order of Foresters* v. *Court Yarborough* (1885), Diprose and Gammon, 325 (claim by district for levy from lodge); compare *Green* v. *Partington* (1895), Diprose and Gammon, 323; *Hutton* v. *Moore* (1887), Diprose and Gammon, 326; *Huddersfield District of the National Independent Order of Oddfellows* v. *Taylor* (1888), Diprose and Gammon, 327.

(*i*) *Re Hogg, Ex parte Parkin* (1898), 14 T. L. R. 210; see *Falconer* v. *Travellers' Rest Lodge, Manchester Unity Independent Order of Oddfellows* (1895), Diprose and Gammon, 426; *Heath* v. *Loyal Oak Lodge (Trustees) Manchester Unity Independent Order of Oddfellows* (1892), Diprose and Gammon, 27, 424; *Stanebury* v. *Pride of Devon Lodge, Manchester Unity Independent Order of Oddfellows* (1893), Diprose and Gammon, 237; *Rooum* v. *Good Samaritan Lodge* (1886), Diprose and Gammon, 109; *Staniforth* v. *Bowley* (1892), Diprose and Gammon, 108; *Netherway* v. *Raven Lodge, Manchester Unity Independent Order of Oddfellows* (1878), Diprose and Gammon, 387; *Straw* v. *Disney* (1889), Diprose and Gammon, 110; *Cahill* v. *Eustace* (1879), Diprose and Gammon, 409; *White* v. *Hussey* (1885), Diprose and Gammon, 415; *Stock* v. *Revill* (1885), Diprose and Gammon, 418; *Barker* v. *Prudence of the Vale Lodge, Manchester Unity Independent Order of Oddfellows* (1891), Diprose and Gammon, 421. As to when application for prohibition is too late, see *Re Denton* v. *Marshall* (1863), 1 H. & C. 654.

(*k*) *Loyal Prince of Wales Lodge, Grand United Order of Oddfellows (Trustees)* v. *Wrexham District (Trustees)* (1885), Diprose and Gammon, 29.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (5). *Quære*, whether the county court judge sits under such circumstances as arbitrator or judge; see *Wilkinson* v. *Jagger* (1887), 20 Q. B. D. 423.

(*m*) *Wilkinson* v. *Jagger, supra;* County Court Rules, 1903, Ord. 41, r. 2; see title COUNTY COURTS, Vol. VIII., pp. 460 *et seq.*

(*n*) *I.e.*, under Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6).

(*o*) *Wilkinson* v. *Jagger, supra;* see also title COUNTY COURTS, Vol. VIII., pp. 601, 603, 604, 653.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (7).

(*q*) *Wilkinson* v. *Jagger, supra;* and as to secession, see p. 196, *post.* As to disputes between a collecting society and its members and the determination thereof by the county court, see p. 178, *ante.*

SECT. 4. By Justices of the Peace.

SECT. 4.—*By Justices of the Peace* (*r*).

Jurisdiction.

383. Where justices have jurisdiction to determine a dispute between a member and a society, and the society is open to country members, the justices of the locality in which the member resides may determine the dispute (*s*).

When primary tribunal.

Effect of decision.

384. Where the rules of a registered society or branch direct that disputes shall be referred to justices, the court of summary jurisdiction is the primary tribunal (*t*), though, if the parties consent, the matter may be dealt with by the county court (*u*). The decision of justices, in a case where the rules of a registered society direct that disputes shall be determined by them, is final and conclusive on all parties without appeal, and cannot be removed into any court of law nor be restrained by injunction (*v*); it is enforceable by the county court (*a*). Magistrates have no jurisdiction beyond the actual complaint made (*b*).

When rules are silent.

385. Where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society or branch for a reference under its rules, the member may apply to a court of summary jurisdiction to hear and determine the matter (*c*).

Members of Territorial Force.

386. Disputes between registered or unregistered friendly societies and persons enrolled or serving as members of the Territorial Force, by reason of that enrolment or service, must be decided by a court of summary jurisdiction (*d*).

Collecting societies.

387. Disputes between a collecting society and members, or between any person claiming through them or under the rules, may, notwithstanding any contrary provisions in the rules, be settled by a court of summary jurisdiction (*e*).

(*r*) As to justices generally, see title MAGISTRATES.

(*s*) *Sharp* v. *Aspinall* (1829), 8 L. J. (o. s.) (M. C.) 70. Compare, in the case of collecting societies, Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 7; and see p. 178, *ante*.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (5).

(*u*) *Ibid.*

(*v*) *Ibid.*, s. 68 (1); compare *Callaghan* v. *Dolwin* (1869), L. R. 4 C. P. 288, overruling *R.* v. *Lambarde* (1866), L. R. 1 Q. B. 388.

(*a*) See p. 180, *ante*.

(*b*) *R.* v. *Soper* (1825), 5 Dow. & Ry. (K. B.) 669, where a complaint was lodged to recover arrears of sick pay, and the magistrates ordered payment and that complainant should remain a member of the society.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6). In the case of a society with branches the forty days do not begin to run until application has been made in succession to all the bodies entitled to determine the dispute under the rules of the society or branch, so, however, that no rules shall require a greater delay than three months between each successive determination (*ibid.*); see *R.* v. *Grant* (1849), 14 Q. B. 43, where the magistrates held that the arbitrators had come to no decision; compare *Re Holt* (*Alfred*) (1878), 4 Q. B. D. 29 (decided on one of the repealed Friendly Societies Acts).

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 43 (2). The section refers in terms to militiamen, volunteers, and yeomanry, but was made applicable to the Territorial Force by Order in Council dated 19th March, 1908, under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28; see p. 150, *ante*. As to the Territorial Force, see title ROYAL FORCES.

(*e*) Collecting Societies and Industrial Assurance Companies Act, 1896

SECT. 4. By Justices of the Peace.

388. An order of justices upon a party requiring him to pay money to a person claiming it as a member of a friendly society must find in direct terms that the claimant was a member of the society, that the sum claimed was due, and that the person against whom the claim was made was an officer of the society (*f*). Terms of order.

Applications to quash orders of magistrates, where such orders exceed their jurisdiction, should be made to the High Court (*g*). Application to High Court.

An indictment lies against the president and stewards of a friendly society for disobeying an order of justices addressed to them to re-admit a member, though it is sworn that the power of doing so is not in the president and the stewards, but in a committee (*h*). Enforcing order.

389. Where the rules provide for the settlement of a dispute by arbitration, the justices have no jurisdiction while the award of the arbitrators stands (*i*), that is to say, until the award is impeached, and *mala fides* or some defect is proved making it a nullity (*k*). The justices also have no jurisdiction where the question concerns the expulsion of a member of an unregistered society (*l*). Where magistrates make an order for payment of money to a member, though the rules of the society do not provide for reference of disputes to justices, the appellant is disentitled to a writ of *certiorari* to quash the magistrates' order if he did not direct the magistrates' attention to the rules at the time the case was heard (*m*). Where justices have no jurisdiction.

SECT. 5.—*By Registrar.*

390. The parties to a dispute in a registered society or branch may by consent (unless the rules of the society or branch expressly forbid) refer the dispute to the Chief Registrar (*n*). Such reference Reference by consent to Chief Registrar.

(59 & 60 Vict. c. 26), s. 7. This provision applies to registered and unregistered societies (*ibid.*, s. 1; compare *Knowles* v. *Booth* (1883), 32 W. R. 432; and see p. 178, *ante*).

(*f*) *Day* v. *King* (1836), 5 L. J. (M. C.) 130; see also *Parker* v. *Boughey* (1862), 31 L. J. (M. C.) 272; *Hammond* v. *Bendyshe* (1849), 13 Q. B. 869.

(*g*) See *R.* (*Duane*) v. *Dublin Justices* (1891), 28 L. R. Ir. 516; *Re Holt* (*Alfred*) (1878), 4 Q. B. D. 29; *Callaghan* v. *Dolwin* (1869), L. R. 4 C. P. 288; *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891), 64 L. T. 775; *R.* (*M'Aneny*) v. *Tyrone County Court Judge* (1910), 44 I. L. T. 147.

(*h*) *R.* v. *Wade* (1831), 9 L. J. (O. S.) (M. C.) 113; see *R.* v. *Gilkes* (1828), 8 B. & C. 439. By stat. (1809) 49 Geo. 3, c. 125, s. 4 (repealed), it was expressly enacted that all orders of justices made on the complaint of individual members should be made on the presidents or other principal officers, and should bind them and the societies.

(*i*) *Bache* v. *Billingham*, [1894] 1 Q. B. 107, C. A.; *Ex parte Long* (1854), 3 W. R. 18.

(*k*) *Ex parte Long*, *supra*.

(*l*) *Fowler* v. *Royal Liver Friendly Society* (1897), 102 L. T. Jo. 394. Jurisdiction as to registered societies was granted by Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 6; see p. 177, *ante*.

(*m*) As to the effect of a decision by justices beyond their jurisdiction, see *Re West London Philanthropic Burial Society, Cordery* v. *Greaves* (1869), 20 L. T. 972.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (2). Every reference of a dispute to the Chief Registrar must be written in duplicate on foolscap paper in Form M (Treasury Regulations, 1897 (26)). Upon receipt of

SECT. 5. By Registrar.

is a submission to arbitration within the meaning of the Arbitration Act, 1889 (*o*).

Powers of registrar.

391. The registrar to whom a dispute is referred must, with the consent of the Treasury, either by himself or by any other registrar, hear and determine the dispute (*p*). He may (1) order the expenses of determining the dispute to be paid either out of the funds of the society or branch, or by such parties to the dispute as he may think fit (*q*); (2) administer oaths and require the attendance of all parties concerned, and of witnesses, and the production of all books and documents relating to the matter in question (*r*); (3) grant discovery or inspection of documents (*s*); and (4), at the request of either party, state a case for the opinion of the High Court (*t*).

His order has the same effect, and is enforceable in like manner, as a decision made as directed by the rules of a society or branch (*u*).

Part XIII.—Offences, Penalties and Proceedings.

SECT. 1.—*Offences and Penalties.*

SUB-SECT. 1.—*Statutory Offences and Penalties.*

Offences.

392. It is an offence if a registered society or branch, or an officer or member—

(1) Fails to give any notice, send any return or document, do or allow to be done anything required by the Act to be given, sent, done or allowed to be done;

(2) Wilfully neglects or refuses to do any act or furnish any information required for the purposes of the Act by the registrar or any authorised person, or does anything forbidden by the Act; or

the reference the Registrar transmits one copy to the Treasury for their consent (Treasury Regulations, 1897 (27)). As to arbitrations by the Registrar in the case of disputes between depositors and trustee savings banks, see title BANKERS AND BANKING, Vol. I., p. 578.

(*o*) 52 & 53 Vict. c. 49; see note (*m*), p. 179, *ante;* and title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (3).

(*q*) *Ibid.*

(*r*) *Ibid.*, s. 68 (4). Every notice of hearing by the Registrar and every requisition for the attendance of parties and witnesses, and the production of books and documents, must be in Form N (Treasury Regulations, 1897 (28)). Where it is necessary to enforce the attendance of a particular witness or the production of a particular document, notice must be in Form O (*ibid.* (29)). A refusal to attend or produce documents is an offence punishable by fine of £5 (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, ss. 84 (e), 89).

(*s*) *Ibid.*, s. 68 (7). As to form of order for discovery, see Treasury Regulations, 1897, (30), Form P.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (7).

(*u*) *Ibid.*, s. 68 (3); and see pp. 178, 179, 180, *ante.* The determination and order of the Registrar must be in Form S, or as near thereto as the circumstances of the case may in his judgment allow (Treasury Regulations, 1897 (32)). The fee for the determination of a registrar is £1, and £1 for every adjournment *ibid.* (70)).

(3) Makes a return or gives information in any respect false or insufficient (*v*).

It is also an offence if an officer or member of a body which, having been a branch of a society, has wholly seceded or been expelled from that society and thereafter uses the society's name, or any other name implying that the body is still a branch of the society, or the number by which that body was designated as a branch (*a*). Improper use of name.

393. It is an offence for a registered or unregistered society or branch to pay money on the death of a child under ten years of age otherwise than in accordance with the Act of 1896 (*b*). Similarly a parent, or personal representative of a parent, claiming money on the death of a child commits an offence if he— Payment of money on death of child.

(1) Produces a certificate of the death otherwise than in accordance with the provisions of the Act;

(2) Produces a false certificate or one fraudulently obtained; or

(3) In any way attempts to defeat the provisions of the Act with respect to payments upon the death of children (*c*).

394. If any registered society or branch is guilty of an offence, every officer of the society or branch bound by the rules thereof to fulfil any duty whereof the offence is a breach, or if there is no such officer, then every member of the committee, unless that member is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is liable to the same penalty as if he had committed the offence (*d*). Liability to penalties.

Every default constituting an offence, if continued, constitutes a new offence in every week (*e*).

395. Any officer or person who aids or abets in the amalgamation or transfer of engagements or in the dissolution of a friendly society, otherwise than as provided, is liable on summary conviction to a fine of not more than £5, or to imprisonment with hard labour for a term not exceeding three months (*f*). Amalgamation or dissolution.

(*v*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84 (a), (b), (c). Penalty—fine of not more than £5 for all offences enumerated in ss. 84, 89. For cases of failure to make annual returns, see *Friendly Societies* (*Registrar*) v. *United Foresters Club* (1884), Diprose and Gammon, 12; *Friendly Societies* (*Registrar*) v. *Rational Sick and Burial Association* (1884), Diprose and Gammon, 13; *Imperial Order of Oddfellows* v. *Barlow* (1884), Diprose and Gammon, 15; *Tomkins* v. *Kilgour* (1879), Diprose and Gammon, 262; of withholding property, *Taysum* v. *Tayloe* (1879), Diprose and Gammon, 262. See also, as to offences in connection with proceedings on inspection of affairs and on reference of dispute to registrar, notes (*h*) and (*l*), p. 175, and note (*r*), p. 184, *ante*.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84 (d).

(*b*) *Ibid.*, s. 84 (f); see p. 156, *ante*.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 84 (g).

(*d*) *Ibid.*, s. 85; see *Booth* v. *Weightman* (1904), 20 T. L. R. 651.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 86; see *Harpin* v. *Sykes* (1885), 49 J. P. 148.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 90; see also *ibid.*, s. 89. Presumably this rule refers only to registered societies, although s. 90, *ibid.*, omits the word "registered" before "friendly society"; and, apparently, the provision does not apply to a winding up by the court. As to amalgamation, transfer of engagements and dissolution, see pp. 192 *et seq.*, *post*.

SECT. 1. Offences and Penalties.

False statements.

396. It is a misdemeanour, punishable by fine or imprisonment, or both, to give, with intent to mislead or defraud, to any person—

(1) A copy of any rules, laws, regulations, or other documents, other than the rules of a registered society or branch, on the pretence that they are the existing rules, or that there are no other rules, of that society or branch (*g*); or

(2) A copy of any rules on the pretence that they are the rules of a registered society or branch when in fact the society or branch is not registered (*h*).

It is also a misdemeanour for any person knowingly to make a false or fraudulent statement in any statutory declaration required by the Act of 1896 (*i*).

Criminal proceedings.

397. Any person, including an officer (*k*), an officer's private clerk (*l*), or a member (*m*), who by false representation or imposition obtains possession of any real or personal property, including books or papers (*n*), belonging to a registered society or branch, or having the same in his possession dishonestly (*o*) withholds or misapplies the same, or dishonestly (*o*) and wilfully applies any part thereof to purposes other than those expressed or directed in the rules and authorised by the Act of 1896, is liable on summary conviction to a fine not exceeding £20 and costs, and to be ordered to deliver up all such property, or to repay the amount of money applied improperly (*p*). In default of such delivery or repayment or of payment of such fine and costs, he may be imprisoned with or without hard labour for any time not exceeding three months (*q*).

A *primâ facie* case for granting a summons is made out (*r*) if a deficiency, not fairly attributable to waste or depreciation, exists in

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (1); see further, as to proceedings under this section, p. 188, *post*.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (1).

(*i*) *Ibid.*, s. 87 (2).

(*k*) See *R.* v. *Bennett* (1894), 10 R. 456.

(*l*) See *Re Mutual Aid Permanent Benefit Building Society, Ex parte James* (1883), 48 J. P. 54. An officer is liable for misappropriation by his private clerk (*ibid.*).

(*m*) *Re Briton Friendly Society* (1852), 1 W. R. 50.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106; *R.* v. *Benbow* (1891), Diprose and Gammon, 1 (embezzlement by secretary); *R.* v. *Richards* (1882), Diprose and Gammon, 258 (fraud by secretary).

(*o*) See *Scott* v. *Wilson* (1893), 9 T. L. R. 492; *Barrett* v. *Markham* (1872), L. R. 7 C. P. 405; *Morning Star Lodge, Manchester Unity Independent Order of Oddfellows* (*Leeds District*) v. *Hewitt* (1892), Diprose and Gammon, 261; *R.* v. *Watson* (1884), Diprose and Gammon, 536; *R.* v. *Rhodes* (1893), Diprose and Gammon, 344; *R.* v. *Bland* (1886), Diprose and Gammon, 528; *R.* v. *Jelf* (1888), Diprose and Gammon, 529. As to "withholding" being a continuing offence, see Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, and *Mayer* v. *Harding* (1867), 17 L. T. 140.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (3); *R.* v. *Robson* (1883), Diprose and Gammon, 259; see *R.* v. *Stafford Justices, Ex parte Foster* (1894), 97 L. T. 123.

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (3).

(*r*) Under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (3); see further, as to proceedings, p. 188, *post*. The section is not intended as a civil remedy (see Report of Chief Registrar, 1906, p. 9; *Madden* v. *Rhodes*, [1906] 1 K. B. 534, following *Barrett* v. *Markham*, *supra*; and compare *R.* v. *Truscott* (1899), 81 L. T. 188.

property entrusted to an officer of a friendly society for which he is accountable (*s*). This rule is not, however, applicable in the case of a person innocently receiving money from an officer who is at the time indebted to the society (*t*), or where a treasurer of an unregistered association, which subsequently becomes registered, is not party to the registration and declines to deliver up papers and moneys in his hands belonging to the unregistered association (*u*).

No fraudulent intent.

If on a charge of withholding or misapplying property there is no proof of fraudulent intent, an order may be made for delivery of the property or repayment of moneys improperly applied, with costs, but the person charged is not liable to conviction (*a*). An order of this kind is enforceable as an order for the payment of a civil debt, recoverable summarily before a court of summary jurisdiction (*b*).

Fine for falsification.

398. Any person who wilfully makes, orders, or allows to be made, any entry, erasure in, or omission from a balance sheet of a registered society or branch, or a return or document required to be sent, produced, or delivered, for the purposes of the Act of 1896, with intent to falsify the same, or to evade any of the provisions of the Act, is liable on summary conviction to a fine not exceeding £50 (*c*).

In the case of collecting societies any person falsifying a contribution or collecting book is liable to a fine up to £50, which is recoverable at the suit of the Chief Registrar or any assistant registrar or of any person aggrieved (*d*).

Violation of Act of Parliament.

399. To violate an Act of Parliament although there is no specific penalty annexed to that violation is a misdemeanour (*e*).

SUB-SECT. 2.—*Summary Procedure under Statute.*

Jurisdiction of court of summary jurisdiction.

400. Offences and fines under the Act of 1896 may in England be prosecuted and recovered summarily (*f*)—(1) at the place where the offence was committed; (2) in the case of a prosecution against a registered society, branch, or officer thereof, at the place where the office of the society or branch is situated; or (3) in the case of a prosecution against a person other than a registered society, or branch or officer thereof, at the place where the person is resident at the time of the institution of the prosecution (*g*).

(*s*) *R.* v. *Bennett* (1894), 10 R. 456.

(*t*) *Ex parte O'Donnell* (1865), L. R. 1 Q. B. 274.

(*u*) *Patrick* v. *Gilbert* (1870), 18 W. R. 315. But compare *Ex parte Gordon* (1851), 15 J. P. 767, where a treasurer of a society which divided, and of which one division was registered, was convicted of withholding from the registered portion moneys originally belonging to the entire society.

(*a*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 9. See *R.* v. *Pedlar* (1887), Diprose and Gammon, 147 (absence of fraud); *R.* v. *Truscott* (1899), 81 L. T. 188.

(*b*) *Ibid.* As to such courts, see title MAGISTRATES.

(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 88.

(*d*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 15. As to procedure, see p. 188, *post*.

(*e*) *Re London and Eastern Banking Corporation, Longworth's Executors' Case* (1859), 1 De G. F. & J. 17, *per* Lord CAMPBELL, L.C., at p. 31. As to misdemeanours generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 246.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 92. As to summary jurisdiction generally, see title MAGISTRATES.

(*g*) *Ibid.*

SECT. 1. Offences and Penalties.

Recovery of fines and costs.

401. Fines imposed by the Act of 1896, or any regulations thereunder, or by the rules of a registered society or branch, are recoverable in a court of summary jurisdiction at the suit of the registrar or of any person aggrieved (*h*). Similarly, costs or expenses ordered by the registrar to be paid by any person under the Act of 1896 are recoverable summarily as a civil debt (*i*).

Who may prosecute.

402. Criminal proceedings (*k*) may be taken—(1) in the case of a registered society, by the society or any member authorised by the society, or the trustees or committee; (2) in the case of a registered branch, by the branch or any member authorised by the branch, or the trustees or committee, or the central body of the society or any member of the society or branch authorised by the central body; and (3) in any case, by the Chief Registrar or any assistant registrar authorised by him, or by any member of the society or branch authorised by the Central Office (*l*). A conviction will be set aside as *ultra vires* if the complaint was made by officers of a society who were not officers appointed for the purpose (*m*).

Appeal.

403. An appeal lies to quarter sessions from any order or conviction made by a court of summary jurisdiction under the Act of 1896 (*n*).

Offences under Collecting Societies and Industrial Assurance Companies Act, 1896.

404. The provisions of the Act of 1896 (*o*), with respect to offences under that Act, and the procedure relating thereto, apply in the case of offences under the Collecting Societies and Industrial Assurance Companies Act, 1896 (*p*). So applied, they extend to unregistered collecting societies as if they were registered societies.

SUB-SECT. 3.—*Proceedings under General Law against Officers.*

Remedy by action.

405. Criminal proceedings taken under the Act of 1896 (*q*) do not take away the common law remedy by action against an officer for money had and received (*r*); but an order for repayment, followed by imprisonment in default, is a bar to an action brought by a society for recovery of the same moneys (*s*).

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 91; as to meaning of "person aggrieved," see *Robinson* v. *Currey* (1881), 7 Q. B. D. 465, 475, C. A.

(*i*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 10.

(*k*) *I.e.*, proceedings under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87; see p. 186, *ante*.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87 (4). For forms of application for authority of registry office to prosecute, and of statutory declaration in support thereof, see Encyclopædia of Forms and Precedents, Vol. VI., p. 95.

(*m*) *Ex parte Gordon* (1851), 15 J. P. 767.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 93 (1). As to quarter sessions generally, see title MAGISTRATES.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 84—94.

(*p*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 14 (2).

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87; see p. 186, *ante*.

(*r*) *Sinden* v. *Banks* (1861), 3 E. & E. 623; *Sharp* v. *Warren* (1818), 6 Price, 131.

(*s*) *Vernon* v. *Watson*, [1891] 2 Q. B. 288, C. A., *per* Lord HALSBURY, L.C., at p. 290; *Knight* v. *Whitmore* (1885), 53 L. T. 233.

The provisions of the Act of 1896 (*t*) do not prevent any person from being proceeded against by indictment, if a conviction has not previously been obtained against him for the same offence under that Act (*a*). Proceedings by indictment against an officer for misappropriation are not superseded by the statutory remedy provided to enforce a civil debt (*b*).

Indictment.

406. A secretary of a friendly society may be convicted of embezzlement if he appropriates to his own use moneys paid in by members and omits to enter them as received in the society's books (*c*), whether he is a paid or unpaid servant of the society, and whether he is a member of it or not (*d*). So, too, a secretary may be convicted of obtaining money by false pretences if he falsely represents to a member that he owes the society a larger sum than is the fact and obtains it (*e*). A charge of embezzlement against a secretary of a registered friendly society is dismissed if no proof of registration is produced at the trial (*f*).

Embezzlement by secretary.

Obtaining money by false pretences.

A treasurer of a friendly society is not a clerk or servant of the trustees, so as to enable him to be convicted of embezzlement (*g*). A treasurer of an unregistered society may be convicted of forgery if he appropriates moneys belonging to the society by means of a fictitious banker's pass-book (*h*).

Embezzlement by treasurer.

Forgery.

A clerk of a friendly society, fraudulently withholding rents collected in the course of his duty as clerk, may be convicted of embezzlement, and it is no defence that the business of the society has not been conducted according to the statute (*i*); but a member of a society employed, with others, without remuneration, to sell certain excursion tickets on behalf of the society, and to pay over moneys received to a person appointed, is a joint owner of the moneys, and is not liable to be indicted as a clerk or servant for embezzlement (*k*).

Embezzlement by clerk.

If moneys belonging to a society are misappropriated by a trustee he cannot be convicted on the charge of stealing moneys belonging to the treasurer (*l*).

Misappropriation by trustee.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).
(*a*) *Ibid.*, s. 87 (5).
(*b*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35; *R.* v. *Stafford Justices, Ex parte Foster* (1894), 97 L. T. Jo. 123.
(*c*) *R.* v. *Proud* (1861), Le. & Ca. 97; see *R.* v. *Smith* (1894), Diprose and Gammon, 244 (police court); *R.* v. *Cox* (1884), Diprose and Gammon, 246 (police court); *R.* v. *Greenhalgh* (1884), Diprose and Gammon, 247 (police court); *R.* v. *Brown* (1876), Diprose and Gammon, 240 (police court).
(*d*) *R.* v. *Murphy* (1850), 4 Cox, C. C. 101, C. C. R.; see *R.* v. *Hall* (1836), 1 Mood. C. C. 474; and compare *R.* v. *Diprose* (1868), 19 L. T. 292, C. C. R.
(*e*) *R.* v. *Woolley* (1850), 1 Den. 559, C. C. R.; see *R.* v. *Welman* (1853), Dears. C. C. 188. As to member obtaining money by false pretences, see *R.* v. *Dent* (1843), 1 Car. & Kir. 249; *R.* v. *Taylor* (1901), 49 W. R. 671, C. C. R.
(*f*) *R.* v. *Kew* (1885), Diprose and Gammon, p. 242, *coram* POLLOCK, B.
(*g*) *R.* v. *Tyree* (1869), L. R. 1 C. C. R. 177.
(*h*) *R.* v. *Smith* (1862), 31 L. J. (M. C.) 154, C. C. R.; *R.* v. *Harris* (1842), 2 Mood. C. C. 267.
(*i*) *R.* v. *Miller* (1842), 2 Mood. C. C. 249; *R.* v. *Bedford* (1869), 34 J. P. 117, C. C. R.
(*k*) *R.* v. *Bren* (1863), 33 L. J. (M. C.) 59, C. C. R.
(*l*) *R.* v. *Loose* (1860), 2 L. T. 254, C. C. R.; *contra*, *R.* v. *Cain* (1841), 2 Mood. C. C. 204.

SECT. 1. Offences and Penalties.

Proceedings by unregistered society.

407. An unregistered society, even if some of its rules are in restraint of trade, can prefer indictments against its servants or officers for embezzlement (*m*); but, as such a society has no legal existence as a company, association, or co-partnership, the property must be laid in individuals as beneficial owners (*n*).

An action by an unregistered friendly society against the treasurer to recover moneys of the society in his hands is maintainable on two grounds, namely—(1) that, assuming the society to be an illegal association, the action is merely for the purpose of recovering the money of the subscribers, and is not in furtherance of the objects of the society (*o*), and (2) that the society comes within the exception contemplated by the Companies (Consolidation) Act, 1908 (*p*), of a society formed in pursuance of another Act of Parliament, namely, the Act of 1896, which contemplates the existence of unregistered friendly societies (*q*).

Agreement not to prosecute.

408. If any arrangement is made with a defaulting officer, care should be taken to avoid anything which might be an agreement to stifle a prosecution. Such an agreement, whether express (*r*) or implied (*s*), is void, but moneys paid under it, if due to the society, are not recoverable (*t*).

SECT. 2.—*Legal Proceedings by and against Societies.*

Proceedings in name of officers.

409. The trustees of a registered society (*u*) or branch, or officers authorised by its rules (*v*), may bring or defend actions or legal proceedings with respect to any property, right, or claim of the society or branch, and may sue or be sued in their proper names without other description than the title of their office (*a*).

Appearance.

A registered friendly society, if sued in the society's name (*b*), may appear either in that name, with the addition of the words "registered under the Friendly Societies Act, 1896," or by the trustees or other officers appointed to sue or be sued on its behalf (*c*).

(*m*) *R.* v. *Stainer* (1870), 39 L. J. (M. C.) 54, C. C. R.

(*n*) *R.* v. *Tankard*, [1894] 1 Q. B. 548, C. C. R.; but compare *Marrs* v. *Thompson* (1902), 86 L. T. 759 (action against treasurer of unregistered society to recover moneys). As to the status of unregistered societies, see p. 127, *ante*.

(*o*) *Marrs* v. *Thompson*, *supra*, *per* Lord ALVERSTONE, C.J., and DARLING, J.

(*p*) 8 Edw. 7, c. 69, s. 1; repealing and re-enacting Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4. See title COMPANIES, Vol. V., p. 765.

(*q*) *Marrs* v. *Thompson*, *supra*, *per* CHANNELL, J.

(*r*) *Andrews* v. *Southwart* (1885), Diprose and Gammon, 73 (CAVE, J.); see *Ward* v. *Lloyd* (1843), 6 Man. & G. 785; *Flower* v. *Sadler* (1882), 10 Q. B. D. 572, C. A.; *McClatchie* v. *Haslam* (1891), 17 Cox, C. C. 402, C. A.

(*s*) See *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, C. A.

(*t*) *Andrews* v. *Southwart*, *supra*.

(*u*) As to proceedings by unregistered societies, see note (*n*), *supra*, and titles PRACTICE AND PROCEDURE; TRADE AND TRADE UNIONS.

(*v*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (2); it will be observed that this provision does not render any consent from the society necessary.

(*a*) *Ibid.*, s. 94 (1). As to parties to proceedings generally, see title PRACTICE AND PROCEDURE.

(*b*) See, *e.g.*, *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

(*c*) R. S. C., Ord. 12, r. 8, notes; Yearly Practice of the Supreme Court, 1911, p. 88.

SECT. 2. Legal Proceedings by and against Societies.

410. In legal proceedings brought under the Act of 1896 by a member or person claiming through a member, a registered society or branch may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the court in which the legal proceeding is brought, with the addition of the words "on behalf of the society or branch," naming the same (*d*). Officer as defendant.

An officer sued on behalf of the society is not personally liable (*e*). Liability of officer.

The death, resignation, or removal from office of an officer of a friendly society, or any act of such officer after the commencement of proceedings, does not cause the abatement or discontinuance of such proceedings (*f*). No abatement on death of officer.

411. Where proceedings are taken against an officer or other person sued on behalf of a registered society or branch, the officer or other person may be personally served (*g*). In such proceedings (*h*), and also in proceedings taken against a society or branch for the recovery of any fine under the Act of 1896, service may be effected by leaving a true copy of the summons or other process at the registered office of the society or branch, or at any place of business of the society or branch within the jurisdiction of the court in which the proceeding is brought, or if that office or place of business is closed, by posting the copy on the outer door thereof (*i*). Service of summons, writ etc.

Where the service is not personal and when service is made by leaving a true copy of the summons or other process at the registered office of the society or branch, a copy must be sent in a registered letter addressed to the committee at the registered office of the society or branch, and posted at least six days before any further step is taken on the proceeding (*k*).

412. Proceedings may be brought against a trustee of a society or branch by the other trustees or trustee (*l*). Proceedings against trustee.

The Attorney-General is not a necessary party where the proceedings concern a non-charitable friendly society (*m*). Attorney-General.

In an action by a treasurer of a friendly society on a promissory note it is sufficient to show that the rules were filed before default was made (*n*). Action on note.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94 (2); *Roberts* v. *Page* (1876), 1 Q. B. D. 476.

(*e*) *Wormwell* v. *Hailstone* (1830), 6 Bing. 668; *Harrison* v. *Timmins* (1838), 4 M. & W. 510; *Alexander* v. *Worman* (1860), 6 H. & N. 100; *Bibby* v. *Imperial Lodge of Druids* (*Secretary*) (1892), Diprose and Gammon, 177.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94 (3).

(*g*) *Ibid.*, s. 94 (4).

(*h*) *Ibid.*

(*i*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 11.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94 (5).

(*l*) Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 11.

(*m*) See *Anon.* (1745), 3 Atk. 277; and title CHARITIES, Vol. IV., pp. 325, 326.

(*n*) *Margett* v. *Parkes* (1844), 1 Dow. & L. 582.

Part XIV.—Amalgamation, Transfer, Conversion, and Secession.

SECT. 1.

SECT. 1.—*Amalgamation and Transfer.*

Amalgamation and Transfer.

Amalgamation.

413. Two or more registered societies may by special resolution (*a*) unite and become one society, with or without any dissolution or division of funds (*b*).

Transfer of engagements.

414. A registered society may by special resolution (*c*) transfer its engagements to any other registered society undertaking to fulfil such engagements (*d*).

Special requirements for friendly societies.

415. In the case of a registered friendly society, a special resolution for an amalgamation or transfer of engagements is not valid without (1) the assent of five-sixths in value of the members, given either at the meetings at which the resolution is passed and confirmed, or at one of them, or in writing (*e*) (the value of members being ascertained by giving one vote to every member, and an additional vote for every five years of membership, but to no one member more than five votes in all) (*f*); and (2) the written consent of every person receiving or entitled to any benefit from the funds of the society, unless his claim is first satisfied or provided for (*g*).

Power to dispense with consents.

On the application (*h*) of the trustees or committee of a society, and upon notice of that application being published in the *London Gazette* (*i*), the Chief Registrar may, with the consent of the

(*a*) For meaning of special resolution, see p. 160, *ante*. For form of resolution, see Encyclopædia of Forms and Precedents, Vol. VI., p. 63, Form 18; as to penalties for improper amalgamation, see p. 185, *ante*.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (1). Every application to register a special resolution for the amalgamation of societies must be made by each of the societies in duplicate in official Form V (Treasury Regulations, 1897), and must be sent to the Central Office, accompanied by statutory declarations from officers of each society in official Form U (*ibid.*, 1897) (34)). No acknowledgment of registry is given to either society until special resolutions in the like terms have been submitted by the other or others (*ibid.*). There is no statutory provision for amalgamation or transfer in case of unregistered societies.

(*c*) For meaning of special resolution, see p. 160, *ante*. For form of resolution, see Encyclopædia of Forms and Precedents, Vol. VI., p. 63, Form 19.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (2). Every application to register a special resolution for the transfer of engagements must be in duplicate in Form W (Treasury Regulations, 1897), and must be sent to the Central Office accompanied by statutory declarations in Forms U and X (*ibid.* (35)). The registrar may require and receive, as an alternative to such declaration, information in Forms UI and XI (*ibid.*, 1897 (75)).

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (3) (a).

(*f*) *Ibid.*, s. 70 (6).

(*g*) *Ibid.*, s. 70 (3) (b).

(*h*) The application must be in Form Z (Treasury Regulations, 1897), and must be sent to the registrar in duplicate, with a copy of the *London Gazette* in which the advertisement is published (*ibid.*, 1897 (37)).

(*i*) Notice to be in Form Y (Treasury Regulations, 1897), and to be advertised in the *London Gazette* at least one month before application to the registrar (*ibid.* (36)).

Treasury (*k*), dispense with any consents and conditions required by the Act of 1896 or the regulations, and may confirm the amalgamation or transfer (*l*).

Vesting of property.

416. On amalgamation the property of the amalgamating societies, other than stocks and securities in the public funds (*m*), vests in the trustees of the amalgamated society without conveyance or transfer (*n*).

Dissatisfied member.

417. A member of a society which has amalgamated or transferred its engagements, or a person claiming any benefit from its funds, who is dissatisfied with the provision made for satisfying his claim, may apply to the county court for relief (*o*); but the county court has no jurisdiction (*p*) prior to the confirmation of the special resolution (*q*).

Amalgamation of juvenile and adult societies.

418. The above rules do not apply to the amalgamation of (1) a registered society consisting wholly of members under twenty-one years of age with (2) a registered society or branch having members above that age. Amalgamation in such cases, or provision for distributing among several branches the members of a juvenile society, is effected by ordinary resolutions registered in the manner required for the registration of an amendment of rules (*r*).

SECT. 2.—*Conversion into Limited Company.*

Conversion into limited company.

419. A registered society may by special resolution (*s*) convert itself into a limited company under the Companies (Consolidation)

(*k*) See Treasury Regulations, 1897 (38). If more than one hearing or adjournment is necessary, the same fee is payable as in the case of a dispute (*ibid.* (41)).

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (4). As to forms and registration in such cases, see Treasury Regulations, 1897 (39), (40). The fee payable is £1 (*ibid.* (70)).

(*m*) See Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 50.

(*n*) *Ibid.*, ss. 49 (1), 50. An amalgamation or transfer of engagements does not prejudice any right of a creditor of any society concerned (*ibid.*, s. 72).

(*o*) *Ibid.*, s. 70 (7).

(*p*) *Ibid.* For the powers of the county court, see p. 180, *ante*.

(*q*) *Jones* v. *Slee* (1886), 32 Ch. D. 585, C. A.

(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (5). For registration of amendment of rules, see p. 140, *ante*.

(*s*) See *Blythe* v. *Birtley*, [1910] 1 Ch. 228, C. A. As to special resolutions, generally, see p. 160, *ante*. For form of resolution, see Encyclopædia of Forms and Precedents, Vol. VI., p. 64. Every application to register a special resolution for converting a society into a company must be in triplicate in Form AA (Treasury Regulations, 1897), and must be sent to the Central Office accompanied by a statutory declaration in Form U (*ibid.* (42)). An application for registry of a special resolution for amalgamation with a company, or for a transfer of engagements to a company, must be sent to the Central Office in duplicate in Form V or W, as the case may be, with the necessary modifications to suit the facts, and must be accompanied by statutory declarations in Forms U and AC (*ibid.* (43)). Where the special resolution is for conversion into, amalgamation with, or transfer of all the engagements of a society to, a company, the following words must be written at the foot:—"The registry of the Society is hereby cancelled (*or* directed to be

SECT. 2. Conversion into Limited Company.

Act, 1908 (*t*), or amalgamate or transfer its engagements to any such company (*u*).

The range of objects of the company into which the society may be converted need not be precisely limited to the purposes defined in the rules as the objects of the society, nor be strictly confined to the objects specified or referred to in the Act of 1896 (*x*).

When a registered friendly society has been converted into a limited company, the objects of which, as declared by the memorandum of association, are to continue the business of the society, and also to carry on an extended range of business, the members of the company are not entitled to an injunction restraining the company from carrying out those of the objects of its memorandum which are in excess of the objects of the original society; and this even assuming that the special resolution for conversion was *ultra vires* of the society (*a*). The validity of such a special resolution passed before 3rd August, 1910, is not to be questioned on the ground that the objects of the company, as therein set forth, extend beyond those authorised by the rules of the society at the date of the passing of the resolution, or that in any other respect the requirements of the Act of 1896 (*b*) have not been complied with (*c*); but where the business carried on by the society before conversion included insurance business, the objects of the company are not to extend beyond those authorised by the rules of the society at the date of the passing of the special resolution, except so far as is necessary for carrying out any assurances, contracts, or policies entered into before 3rd August, 1910 (*d*).

Special resolution as memorandum of association.

If a special resolution for converting a society into a company contains the particulars required by the Companies (Consolidation)

cancelled). Chief Registrar" (*ibid.* (44)). See further, as to amalgamation or transfer of engagements, Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (3), (4), (6), (7).

(*t*) 8 Edw. 7, c. 69; see title COMPANIES, Vol. V., p. 626.

(*u*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (1).

(*x*) See *ibid.*, s. 8; and *Blythe* v. *Birtley*, [1909] 1 Ch. 228, C. A., where, at p. 235, COZENS-HARDY, M.R., said: "When it [a friendly society] is a limited company, it may then exercise such powers of enlarging and altering its objects, with the sanction of the court, as are given by the Companies Acts." But a friendly society could not, for example, be converted into a brewery company (*ibid.*); see also *McGlade* v. *Royal London Mutual Insurance Society, Ltd.*, [1910] 2 Ch. 169, C. A. As to the objects specified in the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8, see pp. 123, 124, *ante*.

(*a*) *McGlade* v. *Royal London Mutual Insurance Society, Ltd.*, *supra*. In the course of his judgment COZENS-HARDY, M.R., said, at p. 177: "I think it might have been competent for a member to commence an action, suing on behalf of himself and all other the members of the friendly society, asking for a declaration that the special resolution was *ultra vires*, and that all proceedings under it were therefore void."

(*b*) See note (*s*), p. 193, *ante*.

(*c*) Companies (Converted Societies) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 23), s. 1. The provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 17, relating to conclusiveness of certificates of incorporation apply in this case (*ibid.*); see title COMPANIES, Vol. V., p. 67.

(*d*) *Ibid.*; and see title COMPANIES, Vol. V., pp. 626, 627. The Companies (Converted Societies) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 23), does not affect the right of any converted company to alter its memorandum of association in accordance with the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). See

Act, 1908 (*e*), to be contained in the memorandum of association of a company, and a copy of it has been registered at the Central Office, a copy of the resolution sealed and stamped by the Central Office has the same effect as a memorandum of association duly signed and attested under the Companies (Consolidation) Act, 1908 (*f*).

Cancellation of registry.

420. When a society is registered as, or amalgamates with, or transfers all its engagements to, a company, the registry of the society under the Act of 1896 becomes void and must be cancelled by the registrar (*g*). This rule is applicable equally in the case of a conversion of a collecting society into a mutual company by order of the court (*h*).

Effect of conversion.

The registration of a society as a company does not affect any right or claim subsisting against, nor any penalty incurred by, the society (*i*).

Conversion of collecting society.

421. Without prejudice to the powers conferred on registered societies, to which reference has just been made, the governing body of a collecting society having more than 100,000 members may petition the court for an order converting the society into a mutual company under the Companies (Consolidation) Act, 1908 (*j*). The court may make the order if satisfied that, on a poll being taken, at least 55 per cent. of the members over sixteen years of age are agreeable to the conversion, and may give directions for settling a proper memorandum and articles of association of the company (*k*).

SECT. 3.—*Conversion into Branch.*

Conversion of society into branch.

422. Any society registered before 1st January, 1876, may, by an ordinary resolution passed by a majority of the members or

title COMPANIES, Vol. V., pp. 328 *et seq.*, and *Re Royal London Mutual Insurance Society, Ltd.*, [1910] W. N. 226.

(*e*) 8 Edw. 7, c. 69, ss. 3, 5, repealing and re-enacting Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 10. Upon registration of the sealed copy of the resolution with the Registrar of Joint Stock Companies, the society is converted into a company and ceases to be subject to the provisions of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25). As regards the name of the company, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8, repealing and re-enacting Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20; and title COMPANIES, Vol. V., p. 84.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (2). As to Central Office, see p. 129, *ante*.

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (3). See Treasury Regulations, 1897 (44).

(*h*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36 (4).

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (3). For the purpose of enforcing such rights, claims, or penalties, the society may be sued and proceeded against exactly as if it had not been converted into a company, and such rights, claims, and liabilities to penalties have priority, as against the property of the company, over all other rights or claims against or liabilities of the company (*ibid.*). See *Phillipson* v. *Hale* (1880), 43 L. T. 507, where it was held that a member of a society ordered to be wound up as an unregistered company under the Companies Acts, 1862 and 1867, could not set off the amount of deposits made by him against a claim made against him by the liquidator for a sum advanced by the society.

(*j*) 8 Edw. 7, c. 69.

(*k*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36 (4). Notice of an intention to present a petition must be published in the *London Gazette* and in such newspapers as the court directs (*ibid.*). See also title COMPANIES, Vol. V., p. 626.

SECT. 3. **Conversion into Branch.**

delegates present and entitled to vote at a general meeting of which due notice has been given according to the rules, determine to become a branch of any other registered society, and also, if thought fit, of any registered branch of such a society (*l*).

Amendment of rules.

If the rules of the society do not comply with all the provisions of the Act of 1896 and of the Treasury Regulations (*m*) in respect of the registry of branches, the general meeting at which the resolution is passed may also make the necessary amendments in the rules (*n*). A copy of the rules of the society, showing the amendments, if any, and two copies of the resolution and amendments, each signed by the chairman of the meeting and by the secretary of the society being converted, and countersigned by the secretary of the other society, must be sent to the registrar (*o*).

Registration as branch.

423. No registered society can be registered as a branch until its registry as a society is cancelled (*p*). If the rules submitted to the registrar, amended or not, as the case may be, comply with the provisions of the Act of 1896 and of the Treasury Regulations, the registrar must cancel the registry of the first-mentioned society and register it as a branch of the other society (*q*). He must also, if so specified in the resolution, register it as a branch of any branch of such other society without further request or notice, and must similarly register the amendment of rules without further application or evidence. Until registry the resolution is ineffective (*r*).

The rules of a society which becomes a branch, so far as they are not contrary to any express provisions of the Act of 1896 or of the Treasury Regulations, and subject to any amendment of the kind mentioned, continue in force as the rules of the branch until amended (*s*).

SECT. 4.—*Secession and Expulsion.*

Secession.

424. In the case of a society with branches provision is often made under the rules for the secession of branches (*t*). A secession is invalid when the rules of the society have not been complied with (*u*).

Use of name.

A seceding or expelled branch, or an officer or member thereof, may not use the name of the parent society nor any name implying that it is a branch thereof, nor the number by which it was designated as such branch (*v*).

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 73 (1), (7).
(*m*) See p. 133, *ante*.
(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 73 (2).
(*o*) *Ibid.*, s. 73 (3).
(*p*) Treasury Regulations, 1897 (45).
(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 73 (4). The cancelling need not be advertised (*ibid.*, s. 73 (5); Treasury Regulations (53) n.).
(*r*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 73 (4).
(*s*) *Ibid.*, s. 73 (6).
(*t*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 34; as to registration of a seceding or expelled branch, see p. 134, *ante*.
(*u*) *Schofield* v. *Vause* (1886), 36 W. R. 170, n., C. A. (very fully reported in Diprose and Gammon, pp. 437—509); *Scott* v. *Barton* (1895), Diprose and Gammon, 432. See *Wilkinson* v. *Jagger* (1887), 20 Q. B. D. 423.
(*v*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 21, 84 (d).

SECT. 4. Secession and Expulsion.

Immediately a branch is excluded from a society all the members of the branch are similarly excluded, and such members lose the benefit of a funeral fund if one of the rules is that only members of the society shall be entitled to such benefit (*a*).

Notice of a proposed secession need not be given to members joining a branch after a resolution to secede (*b*). On the secession of a branch, in settling accounts, the funds of the branch are not to be divided as in a winding-up (*c*).

Part XV.—Dissolution.

SECT. 1.—*In General.*

Method of dissolution.

425. Societies and branches (*d*) registered under the Act of 1896, and collecting societies, whether registered or unregistered (*e*), may be terminated in any of the following ways, namely:

(1) As provided by the rules (*f*);

(2) By instrument of dissolution; and

(3) Compulsorily, by award of the registrar (*g*).

A friendly society, whether registered or unregistered, may also be wound up under the Companies (Consolidation) Act, 1908 (*h*). An unregistered society may register itself for the purpose of dissolution (*i*).

Where consent of all members necessary.

Slate club.

Receiver.

426. Where there is no provision for dissolution in the rules of an unregistered society, the society cannot be dissolved except by consent of all the members, or by order of the court, and the court ought not to interfere unless there is a practical impossibility of the society continuing (*j*). If the funds of an unregistered slate club have been expended irregularly, and actuarial *data* are against the possibility of performance of the promises made to subscribers, a receiver will be appointed on the application of persons interested,

(*a*) *Fisher* v. *Brailsford* (1896), Diprose and Gammon, 256; *Smith* v. *Brailsford* (1895), 40 Sol. Jo. 13. See, further, as to the funds of an expelled branch, *Strickland* v. *Starkie* (1900), Report of Chief Registrar (1901), 89, and other cases in that Report.

(*b*) *Re Sheffield Order of Druids Society* (1892), 56 J. P. 613.

(*c*) *Ibid.*

(*d*) As to dissolution generally, see title BUILDING SOCIETIES, Vol. III., pp. 392—400, many of the provisions in the Building Societies Acts being similar to or identical with those contained in the Friendly Societies Acts. As to dissolution of branches, see also Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 82. As to offences in connection with dissolution, see p. 185, *ante*.

(*e*) Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 12.

(*f*) All societies registered under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), must provide by their rules for dissolution (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3), Sched. I. (12).

(*g*) *Ibid.*, s. 78 (1). See pp. 198, 201, *post*. A society cannot by its regulations contract itself out of the powers of dissolution given by statute (*Walker* v. *London Tramways Co.* (1879), 12 Ch. D. 705; see also *Ellis* v. *Dadson*, [1891] W. N. 43).

(*h*) 8 Edw. 7, c. 69, ss. 267, 268; and see p. 202, *post*.

(*i*) See *Fountain's Case, Swift's Case* (1865), 34 L. J. (CH.) 593.

(*j*) *Blake* v. *Smither* (1906), 22 T. L. R. 698.

SECT. 1. In General.

however small their pecuniary interest may be (*k*). The court may dispense with service of notice of a judgment dissolving a society, and instead direct notice to be advertised in certain newspapers (*l*).

Funds of society becoming extinct.

427. On the winding up of a non-charitable (*m*) friendly or other mutual friendly society, the funds are divisible among the members for the time being (*n*). But if the entire beneficial interest in the fund has been exhausted in respect of each contributor, the fund will pass to the Crown as *bona vacantia*, where there are no members, or only honorary members not entitled to relief, or where there are members entitled only to certain fixed annuities which are provided for (*o*).

When court will not restrain dissolution.

428. The court will not restrain an unregistered society from dissolving itself where a great majority of its members agree to such dissolution (*p*).

If a friendly society has dissolved and has ceased to exist, it is sufficiently represented in an administration suit if a single member of each class interested in the affairs of the society is brought before the court (*q*).

SECT. 2.—*Dissolution by Instrument.*

Friendly societies.

429. A registered friendly society or branch may be dissolved with the consent (1) of five-sixths in value of the members (*r*), including honorary and infant members (*s*), their consent being testified by their signatures (*t*) to an instrument of dissolution; and (2) of all persons entitled to any relief, annuity, or other benefit from the funds of the society or branch, unless their claims are satisfied or adequate provision is made for that purpose (*a*). In the case of a branch the consent of the central body is also

(*k*) *Re One and All Sickness and Accident Insurance Association* (1908), *Times*, 12th and 18th December. As to appointment of receivers, generally, see title RECEIVERS.

(*l*) *Re Lead Co.'s Workmen's Funds Society, Lowes* v. *Governor and Company for Smelting Down Lead with Pit and Sea Coal*, [1904] 2 Ch. 196.

(*m*) As to when a friendly society is charitable, see p. 122, *ante;* and title CHARITIES, Vol. IV., p. 110.

(*n*) *Re Russell Institution, Figgins* v. *Baghino*, [1898] 2 Ch. 72; see also title CHARITIES, Vol. IV., p. 119, note (*j*); compare *Mitchell* v. *Burness* (1878), 5 R. (Ct. of Sess.) 954; *Sharp* v. *Dunbar Sailors' Society* (1903), 10 Scots Law Times, 572.

(*o*) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, C. A.; *Braithwaite* v. *A.-G.*, [1909] 1 Ch. 510; see *Re Ruddington Land*, [1909] 1 Ch. 701. See, also, title DESCENT AND DISTRIBUTION, Vol. XI., p. 28.

(*p*) *Waterhouse* v. *Murgatroyd* (1831), 9 L. J. (o. s.) (CH.) 272; notwithstanding a rule to the effect that if three members desire the society to continue the society shall not be dissolved (*ibid.*).

(*q*) *Pare* v. *Clegg* (1861), 29 Beav. 589. As to parties to administration suits, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 335—338

(*r*) As to calculating the value of members, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 70 (6), (7), 78 (2).

(*s*) See *Dennison* v. *Jeffs*, [1896] 1 Ch. 611; and *Rudd* v. *James*, [1896] 2 Ch. 554, C. A.

(*t*) As to presumption of validity of signatures, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (6).

(*a*) See *ibid.*, ss. 78 (1) (c), 79 (4).

SECT. 2. Dissolution by Instrument.

required, unless the dissolution is carried out in accordance with the general rules of the society (*b*).

Where a juvenile branch of a society or central body is, according to the rules, governed by a committee of the central body, the members are precluded from dissolving without the consent of the committee (*c*).

Juvenile society.

430. A society or branch registered under the Act of 1896, other than a friendly society or branch, may be dissolved with the consent of three-fourths of the members, their consent being testified by their signatures to an instrument of dissolution (*d*).

Dissolution of other societies.

431. The consent of a member to a dissolution may be testified by the signature of an agent on his behalf (*e*); but it is doubtful whether infants are competent to appoint agents to execute on their behalf (*f*).

Consent, how testified.

Dissolution may, it seems, be agreed upon without convening a general meeting (*g*).

Meeting unnecessary

432. The instrument of dissolution of a registered society must set forth—

Instrument of dissolution.

(1) The liabilities and assets of the society or branch in detail;

(2) The number of members and the nature of their interests;

(3) The claims of creditors and the provision made for their payment;

(4) The intended appropriation or division of the funds and property of the society or branch, unless such appropriation or division is left to the award of the registrar (*h*).

The instrument must be signed in duplicate (*i*), and registered with all alterations in the same manner as the rules (*k*). When sent for registration, it must be accompanied by a statutory declaration by one of the trustees or by three members and the secretary of the society or branch, stating that it has been signed in the

Signature and registration.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 78 (1) (c).

(*c*) *Rudd* v. *James*, [1896] 2 Ch. 554, C. A.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 78 (1) (b). As to presumption of validity of signatures, see *ibid.*, s. 79 (6).

(*e*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611, not following *Second Edinburgh and Leith 493rd Starr-Bowkett Building Society* v. *Aitken* (1892), 29 Sc. L. R. 456. As to presumption of validity of signatures, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (6).

(*f*) *Rudd* v. *James*, *supra*, where KEKEWICH, J., held that infants were incompetent for this purpose; but in the Court of Appeal, LINDLEY, L.J., left the point open and upheld the decision of the court below upon other grounds.

(*g*) *Re Eclipse Mutual Benefit Association* (1853), 1 K. & J. 30.

(*h*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (1). As to the termination of a branch by suspension and expulsion, and the consequent dealings with the funds, see *Strickland* v. *Starkie* (1900), Report of Chief Registrar (1901), 89, and other unreported cases mentioned in that Report. On the termination of a branch the funds cannot be dealt with without having regard to the rights of the central body; see also *Schofield* v. *Vause* (1886), 36 W. R. 170, n., C. A.

(*i*) Treasury Regulations, 1897 (60). See *Dennison* v. *Jeffs*, *supra*; and title BUILDING SOCIETIES, Vol. III., p. 392. For a form of instrument of dissolution of society, see Encyclopædia of Forms and Precedents, Vol. VI., p. 99; of branch, see *ibid.*, p. 101.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (5).

SECT. 2. **Dissolution by Instrument.**

manner mentioned (*l*). The registrar returns one of the duplicates of the instrument of dissolution to the society, with an acknowledgment of registry (*m*). The instrument does not require to be stamped (*n*).

Alterations.

Subject to similar provisions regarding consents, signature, and registration, the instrument of dissolution may be altered (*o*).

Advertisement of dissolution.

433. Notice (*p*) of dissolution must be advertised by the registrar at the expense of the society or branch in the *London Gazette* and in some newspaper in general circulation in the neighbourhood of the registered office of the society or branch (*q*).

Proceedings to set aside dissolution.

434. Any proceedings to set aside a dissolution must be commenced by a member, or other interested person, or a trustee (*r*), within three months from the date of the advertisement (*s*). Notice also of the proceedings must be given to the Central Office not less than seven days before commencement (*t*). Where an order is made setting aside the dissolution of a society or branch, the society or branch must give notice to the Central Office within seven days after the order has been made (*a*).

Date of dissolution.

435. If no proceedings are commenced within the stated time, or if proceedings are commenced and fail, the legal dissolution of the society or branch takes effect from the date of the advertisement. In such event, proof that the signatures of the parties consenting to the instrument of dissolution were properly obtained is not necessary (*b*).

Effect of instrument.

On registry, the instrument of dissolution and all alterations are binding upon all the members of a society or branch (*c*) including signatories who die between the date of registry and advertisement (*d*).

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (3); Treasury Regulations, 1897 (60). For a form of statutory declaration, see Encyclopædia of Forms and Precedents, Vol. VI., p. 101. The instrument must also be accompanied by a statement naming some newspaper in general circulation in the neighbourhood of the registered office of the society or branch, wherein it is desired that notice of the dissolution shall be published, and of the sum requisite to defray the expenses of such publication, and by the further sum of 5*s.* 6*d.* for the like publication in the *London Gazette* (Treasury Regulations, 1897 (60)).

(*m*) *Ibid.*, (61). No fee is payable, beyond the cost of the advertisements, for the registration of an instrument of dissolution or any alterations.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33 (d).

(*o*) *Ibid.*, s. 79 (2), (5); Treasury Regulations, 1897 (62).

(*p*) In form AR (Treasury Regulations, 1897 (63)).

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 79 (6), 81. The registrar's award for distribution of the funds of a society on distribution is in Form AS, Treasury Regulations, 1897 (64).

(*r*) As to trustees, see *Rudd* v. *James*, [1896] 2 Ch. 554, 561, C. A.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (6).

(*t*) *Ibid.*, s. 83 (1); Treasury Regulations, 1897 (68), Form AX. See also *Wilmot* v. *Grace*, [1892] 1 Q. B. 812. As to Central Office, see p. 129, *ante*.

(*a*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 83 (2). For form of notice, see Treasury Regulations, 1897 (68), Form AY.

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79 (6).

(*c*) *Ibid.*, s. 79 (5).

(*d*) *Fortune* v. *Orr* (1894), Diprose and Gammon, 539. See *Russell* v. *Hereford Friendly Society* (1899), Report of Chief Registrar, 21 (member dying after signing instrument, but before registration, entitled to participate).

SECT. 3.—*Dissolution by Award of Registrar.*

SECT. 3. Dissolution by Award of Registrar.

436. When a dissolution by award of the registrar is desired an application in writing (*e*) must be made to the registrar stating that the funds of a society or branch are insufficient to meet the existing claims thereon, or that the fixed rates of contribution are insufficient to cover the benefits assured, and setting forth grounds for the allegation of insufficiency, and requesting an investigation into the affairs of the society or branch with a view to dissolution (*f*). Upon such application the registrar may, at the expense of the society or branch concerned (*g*), himself investigate or cause an investigation to be made into its affairs, but he must first give one month's notice in writing to the society or branch concerned (*h*).

Application for investigation by registrar.

The consent of the central body of a society is necessary before the registrar can investigate the affairs of a branch with a view to its dissolution (*i*).

Investigation of affairs of branch.

437. If on investigation it appears that the society or branch is unable to meet the claims upon it, or that the fixed rates of contribution are insufficient to cover the benefits assured, the registrar may award that the society or branch be dissolved, and if he so awards, must direct how its affairs are to be wound up (*k*).

Award of registrar.

The award may be suspended for a period to enable the society or branch to make such alterations and adjustments of contributions and benefits as will, in the opinion of the registrar, obviate the necessity for dissolution (*l*).

The powers of the registrar in such an investigation are similar to those exercisable by him on reference of a dispute (*m*).

438. The award, whether for dissolution or distribution of funds, is final and conclusive on the society or branch and all members, and on all other persons (*n*) having any claim on the funds of

Award, where conclusive.

(*e*) For a form of application, see Encyclopædia of Forms and Precedents, Vol. VI., p. 102; Treasury Regulations, 1897 (65), Form AT. The rules of a registered society must provide for investigation being made by the registrar (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sched. I. (13),). The application must be made by one-fifth of the members of a registered society or branch, or by 100 members where the total number is from 1,000 up to 10,000, or by 500 members where the total number exceeds 10,000 (*ibid.*, s. 80 (1)).

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 80 (2).

(*g*) *Ibid.*, s. 80 (6).

(*h*) *Ibid.*, s. 80 (1); Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 8. The notice of investigation must be in Form AU (Treasury Regulations, 1897 (66)). The actuary to the Central Office is usually appointed to make the investigation.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 82. The instrument of dissolution of a branch must be in Form AOb (Treasury Regulations, 1897 (60)).

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 80 (3). For form of award, see Treasury Regulations, 1897 (66), Form AV. The registrar may require the payment to the Exchequer of a reasonable fee for his investigation, in accordance with the scale fixed for valuation (Treasury Regulations, 1897 (19), (70)). As to payment of fees, see *ibid.* (20), (70). The fee for his award is £1 (*ibid.* (70)).

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 80 (3).

(*m*) *Ibid.*, s. 80 (4). As to his power in case of a dispute, see p. 183, *ante*.

(*n*) In *R.* v. *Friendly Societies Chief Registrar, Ex parte Evans* (1900),

SECT. 3. **Dissolution by Award of Registrar.**

the society or branch, and is enforceable in the same manner as a decision of the registrar on a dispute (*o*).

Though there is no appeal from the award on the ground that it is not just as between the parties, application may be made to the High Court to set aside an award on the ground that the registrar has acted *ultra vires* or has not heard all the parties interested (*p*). The same rules apply to proceedings to set aside a dissolution by award (*q*) as in the case of a dissolution by instrument (*r*).

Proceeding to set aside.

Publication of award.

439. Within twenty-one days after making the award, the Central Office must insert notice (*s*) thereof in the *London Gazette* and in a newspaper circulating in the neighbourhood of the registered office of the society or branch concerned (*t*) at the expense of such society or branch (*a*).

SECT. 4.—*Winding up by the Court.*

Winding up under Companies (Consolidation) Act, 1908.

440. The court has jurisdiction under the Companies (Consolidation) Act, 1908 (*b*), to wind up compulsorily, as an unregistered company, a society registered under the Friendly Societies Acts, but not registered under the Companies Acts, but there can be no such winding up voluntarily or under supervision (*c*). This principle would apply equally in the case of unregistered societies. The fact that such a society has passed a resolution to dissolve, and is actually in process of dissolution, does not prevent a creditor from obtaining a winding-up order (*d*). Members of a friendly society who have given notice of withdrawal of deposits are not in the same position as outside creditors, and are not entitled *ex debito justitiæ* to obtain an order for winding up (*e*).

Report of Chief Registrar, 89, VAUGHAN WILLIAMS, L.J., at p. 91, was doubtful whether the words "and all other persons" in s. 80 (5) of the Act of 1896 are meant to include strangers who are creditors, or whether those words are not to be limited as they seem to be limited in *ibid.*, s. 78 (c); also reported (1900) 16 T. L. R. 346, C. A. See also the judgment of A. L. SMITH, L.J. (*ibid.*).

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 80 (5). As to enforcing award, see *ibid.*, s. 68; and pp. 183, 184, *ante*.

(*p*) *Wilmot* v. *Grace*, [1892] 1 Q. B. 812; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 80 (5), (7).

(*q*) *Ibid.*, s. 80 (7).

(*r*) *Ibid.*, s. 79 (6); and see p. 198, *ante*.

(*s*) For form of notice, see Treasury Regulations, 1897 (67), Form AW.

(*t*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 80 (7), 81.

(*a*) *Ibid.*, s. 80 (6).

(*b*) 8 Edw. 7, c. 69, ss. 267, 268, repealing and re-enacting Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199; see, also, title COMPANIES, Vol. V., pp. 647 *et seq.*

(*c*) *Re Alfreton District Friendly and Provident Society* (1863), 7 L. T. 817; *Independent Protestant Loan Fund Society, Ex parte Morton, Friendly Protestant Partnership Loan Fund Co., Ex parte Hall*, [1895] 1 I. R. 1; *Re Irish Mercantile Loan Society*, [1907] 1 I. R. 98; see, also, *Re 20th Century Equitable Friendly Society*, [1910] W. N. 236.

(*d*) *Re Irish Mercantile Loan Society, supra.*

(*e*) *Independent Protestant Loan Fund Society, Ex parte Morton, Friendly Protestant Partnership Loan Fund Co., Ex parte Hall, supra.* As to winding up of companies, see title COMPANIES, Vol. V., pp. 390 *et seq.*; and pp. 647 *et seq.*

SECT. 4. Winding up by the Court.

441. The court has jurisdiction, independently of its powers under the Companies (Consolidation) Act, 1908 (*f*), to wind up an unregistered friendly society where the rules make no provision for dissolution and a large majority of pensioners and non-pensioners have voted for a dissolution by the court. The court may also in such case ascertain the rights of the beneficiaries by a reference to chambers to settle a distribution scheme (*g*). For purposes of distribution the funds are divisible among existing members at the date of the dissolution in proportion to the amounts contributed by each member for fines on admission and subscriptions irrespective of any payments in respect of sick pay or other payments made under the rules, and without interest (*h*).

Winding up unregistered societies.

SECT. 5.—*Cancellation or Suspension of Registry.*

442. The registrar may, if he thinks fit, cancel the registry of a society at the request of the society (*i*).

Cancellation of registry.

443. Where the registrar is satisfied that an acknowledgment of registry has been obtained by fraud or mistake, or that the society exists for an illegal purpose (*j*), or has wilfully and after notice from the registrar violated the provisions of the Act of 1896 (*k*), or has ceased to exist (*l*), he may, with the approval of the Treasury, and after giving not less than two months' notice in writing specifying the grounds for the proposed action (*m*), cancel the registry of a society or suspend the registry for any term not exceeding three months, and he may also from time to time, with the like approval, renew the suspension for a similar period (*n*).

Compulsory cancellation or suspension.

(*f*) 8 Edw. 7, c. 69.

(*g*) *Re Lead Co.'s Workmen's Fund Society, Lowes* v. *Governor and Company for Smelting Down Lead with Pit and Sea Coal*, [1904] 2 Ch. 196, where the society was insolvent; see *Pearce* v. *Piper* (1809), 17 Ves. 1; and title COMPANIES, Vol. V., pp. 647 *et seq.*

(*h*) *Re Lead Co.'s Workmen's Fund Society, Lowes* v. *Governor and Company for Smelting Down Lead with Pit and Sea Coal, supra*, following *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184.

(*i*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 77 (1) (a). For form of request to cancel registry, see Encyclopædia of Forms and Precedents, Vol. VI., p. 98, the official form AI prescribed by Treasury Regulations, 1897 (53). The cancelling of registry must be in Form AL (Treasury Regulations, 1897 (56)). No fee is payable for cancelling registry, but every request to cancel registry must name some newspaper in general circulation in the neighbourhood of the registered office of the society wherein it is desired that the cancellation of registry shall be published, and must be accompanied by the sum required to pay for such publication, and the further sum of 5*s.* 6*d.*, the cost of publication in the *London Gazette* (*ibid.* (53)).

(*j*) See *e.g.*, Report of Chief Registrar, 1881, p. 22.

(*k*) See *e.g.*, Report of Chief Registrar, 1903, p. 14; 1904, p. 13.

(*l*) See *e.g.*, Report of Chief Registrar, 1892, p. 8.

(*m*) For form of notice, see Treasury Regulations, 1897 (55), Form AK.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 77 (1) (b), (2), (3). As to cancelling of registry with a view to registering a society as a branch, see *ibid.*, s. 73, and p. 196, *ante*; and as to cancelling of registry where a society is converted into or amalgamated with, or transfers its engagements to, a company, see s. 71 (3); and pp. 194, 195, *ante*. When the registry of any society registered since 1st January, 1876, is cancelled with a view to its registry as a branch, notice must be given in Form Ab as on the establishment of a new branch (Treasury Regulations, 1897 (59)). The suspension or renewal of suspension

SECT. 5. **Cancellation or Suspension of Registry.**

444. Notice of the cancelling or suspension must be advertised in the *London Gazette* and in a newspaper circulating in the neighbourhood of the registered office of the society (*o*).

If the registry is cancelled or suspended for a period exceeding six months, an appeal lies to the High Court (*p*).

Notice.

Appeal.

445. A society, after the cancellation or during the suspension of its registry, absolutely ceases to enjoy the privileges of a registered society, but without prejudice to any liability incurred by the society, and such liability can be enforced as if no suspension or cancellation had taken place (*q*). It becomes an unregistered society (*r*).

Effect of cancellation and suspension.

must be in Form AM. Where application is made to cancel registry under the compulsory powers of the registrar, he may require the application to be made in duplicate, and to be supported by a statutory declaration. One copy of the application must be sent by the registrar to the Treasury for their consent (Treasury Regulations, 1897 (54)).

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 77 (4), 81. For form of advertisement, see Treasury Regulations, 1897 (58), Form AN. The registrar also sends notice to the Registrar-General of Births, Marriages and Deaths (see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 97), the comptrollers of the National Debt Office (see *ibid.*, ss. 44, 52) and of the Post Office Savings Bank (see *ibid.*, s. 44), and to the chairman of the Board of Inland Revenue (see *ibid.*, s. 33), for the various privileges enumerated in the cited sections are lost by a suspended or cancelled society (Report of Chief Registrar, 1881, 24).

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 77 (6). As to appeals, see also *ibid.*, s. 12.

(*q*) *Ibid.*, s. 77 (5); see *Strickland* v. *Starkie* (1900), Report of Chief Registrar (1901). 89, where the rule of the society was that during suspension a branch is absolutely disentitled to the benefits of the main body on behalf of its members, but is liable to all payments.

(*r*) As to status of unregistered societies, see p. 127, *ante*.

FRIENDS, SOCIETY OF.

See ECCLESIASTICAL LAW; HUSBAND AND WIFE; REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

FRUIT.

See AGRICULTURE; FOOD AND DRUGS.

FRUIT AND HOP PICKERS.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

FUEL ALLOTMENTS.

See ALLOTMENTS; COMMONS,

FUGITIVE CRIMINAL.

See EXTRADITION AND FUGITIVE OFFENDERS,

FUNERAL.

See BURIAL AND CREMATION; EXECUTORS AND ADMINISTRATORS.

FUNERAL EXPENSES.

See ESTATE AND OTHER DEATH DUTIES; EXECUTORS AND ADMINISTRATORS.

FURIOUS DRIVING.

See CRIMINAL LAW AND PROCEDURE; STREET TRAFFIC.

FURNISHED HOUSE.

See LANDLORD AND TENANT.

FURTHER ASSURANCE, COVENANT FOR.

See SALE OF LAND.

GALLON.

See WEIGHTS AND MEASURES.

GAMBLING.

See GAMING AND WAGERING.

GAME.

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Part I.—In General.

Game laws.

446. The term "Game Laws" is a title commonly used to describe a series of statutes which have not a logically connected design, but of which the general aim is to protect from unauthorised pursuit and killing certain birds and animals *ferœ naturæ* which are fit for human food (*a*).

Game.

Strictly speaking there is one Game Act (*b*), and "game" denotes the birds and animals therein defined as such. These are hares, pheasants, partridges, grouse, heath or moor game, black game and bustards (*c*); but certain provisions of the game laws are made applicable to other birds and animals which are the customary object of sport (*d*).

Thus, some of the provisions of the Game Act extend to rabbits, woodcock, snipe, quail, and landrail (*e*); the Game Licences Act (*f*) makes it necessary to have a licence before killing deer as well as the

(*a*) Compare *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, *per* Lord WESTBURY, L.C., at p. 631.

(*b*) Game Act, 1831 (1 & 2 Will. 4, c. 32) (hereinafter for purposes of brevity sometimes referred to as the "Game Act"), which by s. 1 repealed so far as England is concerned all previously existing Game Acts.

(*c*) *Ibid.*, s. 2. The same definition of game is to be found in the Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 13. It includes game whether dead or alive, tame or wild (*Helps* v. *Glenister* (1828), 8 B. & C. 553; *Loome* v. *Baily* (1860), 3 E. & E. 444; *Cook* v. *Trevener*, [1911] 1 K. B. 9). The definitions of game in Scotland and Ireland are somewhat varied. The Game Laws Amendment (Scotland) Act, 1877 (40 & 41 Vict. c. 28), s. 3, defines game as all the animals enumerated in the series of Game Acts set out in the schedule to that Act. The Game Trespass Act, 1864 (27 & 28 Vict. c. 67), s. 2, which extends only to Ireland, includes as game hares, pheasants, partridges, grouse, heath or moor game, black game, woodcocks, snipes, quails, landrails, wild ducks, widgeon and teal.

(*d*) Compare *Jeffryes* v. *Evans* (1865), 19 C. B. (N. S.) 246, *per* WILLES, J., at p. 266.

(*e*) See, for instance, Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31.

(*f*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4.

birds and animals mentioned in the earlier Act; and the definition of "game" in the Poaching Prevention Act, 1862 (*g*), omits bustards but includes rabbits, woodcock and snipe, and the eggs of certain game birds.

Wild birds.

Other birds also commonly spoken of as game (*h*) which are not protected by the above statutes are included in the schedule to the Wild Birds Protection Act, 1880 (*i*), and are protected for that part of the year which is commonly called the close season.

Ground game.

The term "ground game," introduced for the first time by the Ground Game Act, 1880 (*j*), means hares and rabbits.

Part II.—State Preservation of Game.

SECT. 1.—*Close Seasons.*

Sunday and Christmas Day.

447. On certain special days, namely, Sunday and Christmas Day, it is an offence for any person to kill or take any game or to use for that purpose any dog, gun, net, or other engine or instrument (*k*). To make the act of using the snare an offence it is not necessary that it should be set on a Sunday. If set previously but left on the Sunday in such a state as to kill game, there is a user of it to kill game within the meaning of this provision (*l*). The offender is liable on conviction before two justices of the peace to a penalty not exceeding £5 for every such offence, together with the costs of the conviction (*m*).

Close season.

448. The close season, namely, that part of the year during which the killing or taking (*n*) of game and other birds or animals *feræ naturæ* is forbidden, varies in different cases.

Thus, grouse or red game may not be killed or taken between the 10th December in one year and the 12th August in the succeeding year (*o*); black game between the 10th December in one year

(*g*) 25 & 26 Vict. c. 114, s. 1.

(*h*) As, for instance, wild duck, mallard, teal, widgeon, plover, curlew etc.

(*i*) 43 & 44 Vict. c. 35. On the representation of a county council, a Secretary of State may order the application of this Act to other wild birds besides those named in the schedule (Wild Birds Protection Act, 1894 (57 & 58 Vict. c. 24), s. 3; and see title ANIMALS, Vol. I., pp. 405 *et seq.*

(*j*) 43 & 44 Vict. c. 47, s. 8.

(*k*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3. "Game" here means game as defined by the Game Act (see p. 208, *ante*). The term "engine" (derived from "*ingenium*") includes a snare, which is a device or contrivance—an engine—for killing game (*Allen* v. *Thompson* (1870), L. R. 5 Q. B. 336, *per* BLACKBURN, J., at p. 339). The offence may be committed by two or more persons who may be out together, and though only one gun was employed they may be separately convicted of the offence (*R.* v. *Littlechild* (1871), L. R. 6 Q. B. 292).

(*l*) *Allen* v. *Thompson*, *supra*.

(*m*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3; and see title MAGISTRATES.

(*n*) "Taking" means catching, as, for instance, in a snare, with a view to keeping or killing it (*R.* v. *Glover* (1814), Russ. & Ry. 269, C. C. R; *Watkins* v. *Price* (1877), 47 L. J. (M. C.) 1). As to periods of time, in general, within which certain acts may or may not be done, see title TIME.

(*o*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3.

SECT. 1. Close Seasons.

and the 20th August in the succeeding year (*p*); partridges between the 1st February and the 1st September (*q*); pheasants between the 1st February and the 1st October (*r*); bustards between the 1st March and the 1st September (*s*). The penalty for killing or taking any of the above kinds of game in the prohibited period is not exceeding £1 for every head of game killed or taken, together with the costs of the conviction (*t*). There is no close time for the killing or taking of hares (*u*), but with the exception of foreign hares imported into this country they may not be exposed for sale during the months of March, April, May, June, and July, and any person so exposing them is liable to a penalty not exceeding £1, including the costs of conviction (*a*).

There is no close time for rabbits (*b*) nor for deer.

Protection of wild birds.

449. For the birds protected by the Wild Birds Protection Act, 1880 (*c*), the close time prescribed is between the 1st March and the 1st August (*d*), but the time may be varied or extended in the case of particular counties by an order of a Secretary of State on the representation of the council of the county (*e*). There is absolute protection for sand-grouse, which may not be killed at any time (*f*).

Use of fire-arms by night.

450. Although a person duly authorised may kill game by night, he may not use firearms nor a gun of any description for the purpose (*g*). Persons, other than the landlord, who are authorised under the Ground Game Act or otherwise to kill ground game are prohibited from using firearms for the purpose at night, and should

(*p*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3. In the counties of Somerset and Devon and in the New Forest the close season for black game extends to the 1st September.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) *Ibid.*

(*t*) *Ibid.* The days mentioned in each case are not within the prohibited period, and it is therefore not unlawful to kill or take game on either the first or the last day of each period.

(*u*) Except in the case of the occupier of moorlands and uninclosed lands (not being arable land) and the persons authorised by him (see p. 222, *post*).

(*a*) Hares Preservation Act, 1892 (55 & 56 Vict. c. 8), s. 2. Penalties also exist for selling or exposing for sale other game and birds *ferœ naturœ* during the close season. But as to these, see p. 259, *post*.

(*b*) Except in the case of the occupier of moorlands or inclosed lands (not being arable land), and the persons authorised by him (Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (3), as amended by the Ground Game (Amendment) Act, 1906 (6 Edw. 7, c. 21), s. 2). As to the meaning of occupier, see p. 222, *post*.

(*c*) 43 & 44 Vict. c. 35.

(*d*) *Ibid.*, s. 3.

(*e*) *Ibid.*, s. 8. The extension may embrace the whole of the year (Wild Birds Protection Act, 1896 (59 & 60 Vict. c. 56), s. 1). See, generally, title ANIMALS, Vol. I., pp. 405 *et seq.*

(*f*) Sand-Grouse Protection Act, 1888 (51 & 52 Vict. c. 55), s. 1. Although this measure was limited in its original operation to three years, its operation has been extended year by year (see Expiring Laws Continuance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 36)).

(*g*) Hares Act, 1848 (11 & 12 Vict. c. 29), s. 5. No penalty appears to be attached to this provision.

they do so are liable on summary conviction to a penalty not exceeding £2 (*h*).

SECT. 2.—*Poison.*

Poisoning game.

451. Game is also protected from destruction by poison. It is an offence to put or cause to be put at any time any poison or poisonous ingredient on ground, whether open or inclosed, where game usually resort, or on any highway with intent to destroy game (*i*); and an offender is liable upon conviction before two justices to a penalty not exceeding £10, together with the costs of the conviction (*k*). This provision applies strictly to game; it does not include rabbits, but persons having the right to kill ground game render themselves liable to a penalty not exceeding £2 if they employ poison (*l*). Further protection is afforded by statutes dealing with poisoned grain and poisoned flesh (*m*).

Part III.—Private Rights over Game.

SECT. 1.—*Nature and Extent of Rights; Property in Game.*

Property in game.

452. The law of England does not admit a right of absolute property in game, which belongs to the class of animals *feræ naturæ* (*n*), but it does intervene to protect private interests in game by limiting the right over it to certain classes of persons.

These classes acquire their rights in one or other of two ways: (1) *ratione privilegii*, that is, by special grant from the Crown; (2) *ratione soli*, that is, by virtue of ownership or occupation of the soil.

At the Norman Conquest and for many years thereafter the right to kill game was held to reside in the Crown, partly on the ground that the King is the lord paramount of the soil, partly on

(*h*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6. The rights of the landlord are left untouched by this provision (*Smith* v. *Hunt* (1885), 54 L. T. 422), as also are those of tenants on whom the shooting rights are expressly conferred (*May* v. *Waters*, [1910] 1 K. B. 431), but not those of occupying tenants whether in their case the shooting rights are reserved by the landlord or not (*Saunders* v. *Pitfield* (1888), 58 L. T. 108; and see *Waters* v. *Phillips*, [1910] 2 K. B. 465).

(*i*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3; Hares Act, 1848 (11 & 12 Vict. c. 29), s. 5.

(*k*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3. No penalty is prescribed under the corresponding section of the Hares Act, 1848 (11 & 12 Vict. c. 29).

(*l*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6. This does not, however, apply in the case of landlords in occupation of their own land (*Smith* v. *Hunt supra*), or persons on whom the landlord has expressly conferred the right to kill and take the rabbits (*May* v. *Waters*, *supra*).

(*m*) Poisoned Grain Prohibition Act, 1863 (26 & 27 Vict. c. 113); Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115); see title AGRICULTURE, Vol. I., p. 284.

(*n*) But where game or any other animal *feræ naturæ* is kept in captivity or tamed there is an absolute property in it so long as it remains in that condition; see p. 212, *post*; and title ANIMALS, Vol. I., p. 366.

SECT. 1. Nature and Extent of Rights.

the ground that game as *bona vacantia* belongs to the King by his prerogative (*o*).

Crown rights.

The rights of the Crown in regard to forests, chases, manors, warrens etc., still survive either as appurtenant to the Crown itself or as franchises granted (*ratione privilegii*) to certain of its subjects (*p*), but outside such places the rights of the occupier of the soil have been admitted and from time to time extended (*q*), until at the present day the right to kill and take game is recognised as being incidental to the occupation of land, and may, subject to the law of trespass, be exercised by any person. In both cases the right to kill and take any such animals is lost when they have wandered beyond the limits to which the occupation or privilege extends. The property in such animals is therefore not absolute or actual, but qualified and potential (*r*).

Trespass as applied to game.

To go on to the land of another and kill or take that in which he has not absolute property is not larceny (*a*). It is, however, a trespass, and it is a form of trespass to which, in the case of game, penalties are assigned by statute (*b*).

The injured party has the right to bring an action for the trespass, or, if the trespasser has done an act made punishable by the game laws, to prosecute him (*c*).

Property in game.

453. Property which, when the game is alive and free, is only qualified or potential becomes absolute when the game is killed (*d*) or otherwise reduced into possession (*e*).

This is equally the case whether the game is killed by the owner of the land (or persons claiming under him), or by some one acting without his authority (*f*). The game, when dead or captured, is his, and he can claim possession of it, and, if necessary, bring an action for trover (*g*). If game found dead on his land is taken

(*o*) See 2 Bl. Com. 415.

(*p*) See title CONSTITUTIONAL LAW, Vol. VII., p. 184.

(*q*) As, for instance, by stat. (1670) 22 & 23 Car. 2, c. 25; repealed by the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 1.

(*r*) *Case of Swans* (1592), 7 Co. Rep. 15 b, *per* Sir E. COKE, at p. 17 b: "When a man hath savage beasts *ratione privilegii*, as by reason of a park, warren etc., he hath not any property in the deer or conies, or pheasants, or partridges, and therefore in our action *quare parcum warrennum etc. fregit et intravit et tres damas, lepores, cuniculos, phasianos, perdices cepit et asportavit* he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure so long as they remain on the privileged place"—and this is so *a fortiori* when the right is claimed *ratione soli* (*Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, *per* Lord CHELMSFORD, at p. 638).

(*a*) *R.* v. *Townley* (1871), L. R. 1 C. C. R. 315. As to trespass generally, see title TRESPASS.

(*b*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30.

(*c*) See pp. 228 *et seq.*, *post*.

(*d*) *Case of Swans*, *supra*; *Blades* v. *Higgs*, *supra*, *per* Lord WESTBURY, L.C., at p. 631.

(*e*) As by being tamed or made captive.

(*f*) *Blades* v. *Higgs*, *supra*; and see *Rigg* v. *Lonsdale* (*Earl*) (1857), 1 H. & N. 923, Ex. Ch.

(*g*) *Ibid.* But game which has been shot, even though mortally wounded, is not his unless and until it is dead or gathered, so that a person fraudulently picking it up and taking possession of it before it is dead or gathered by or on

away without his authority he can prosecute for larceny (*h*). That he cannot prosecute for larceny in all cases is due to a peculiarity of the law of larceny. When anything not capable in its original state of being the subject of larceny, as for instance a thing fixed to the soil, is taken, it is necessary in order to constitute larceny that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel (*i*). A poacher, therefore, who kills game and carries it away at once, having throughout had that intention, does not commit larceny; but if he subsequently returns to the ground with the newly-formed intention of taking away the game which he had previously killed he is guilty of larceny (*j*).

Larceny.

An exception to the general rule that game when killed becomes the property of the owner of the land where it is killed arises when the game in question is pursued on to the ground where it is killed from elsewhere and captured by the hunter (*k*). The hunter, however, is liable to prosecution for trespass in search of game (*l*).

Exception to rule as to killed game.

Where owing to immaturity or some other cause (as for example, having been tamed or been kept in captivity) game (*m*) cannot stray from its home, the property which the owner of the soil of that home has in it is for the time being absolute, and the game may be the subject of larceny (*n*).

behalf of the owner of the ground cannot be charged with larceny (*R.* v. *Roe* (1870), 11 Cox, C. C. 554, C. C. R.). As to trover generally, see title TROVER AND DETINUE.

(*h*) *R.* v. *Townley* (1871), L. R. 1 C. C. R. 315.

(*i*) *Ibid.*, *per* BOVILL, C.J., at p. 317; compare 1 Hale, P. C. 510; and see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 637, 641.

(*j*) *R.* v. *Townley*, *supra*.

(*k*) The hunter is held to have established his right *per industriam* (*Sutton* v. *Moody* (1697), 1 Ld. Raym. 250, *per* Lord HOLT, C.J.; *Churchward* v. *Studdy* (1811), 14 East, 249; see *Case of Swans* (1592), 7 Co. Rep. 15 b). In *Sutton* v. *Moody*, *supra*, Lord HOLT laid down the proposition that if a trespasser started a hare on the ground of A., and killed it on that of B., the property in the dead hare was in the trespasser. This has been doubted by Lord CHELMSFORD in *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, but it has not been overruled.

(*l*) *Sutton* v. *Moody*, *supra*; *Osbond* v. *Meadows* (1862), 12 C. B. (N. S.) 10; *Kenyon* v. *Hart* (1865), 6 B. & S. 249; *Tanton* v. *Jervis* (1879), 43 J. P. 784; *Horn* v. *Raine* (1898), 67 L. J. (Q. B.) 533; and see p. 228, *post*.

(*m*) Or other birds or animals *ferœ naturœ* that are fit for human food or use, but not birds or animals which are not so fit, as for instance rooks (*Hannam* v. *Mockett* (1824), 4 Dow. & Ry. (K. B.) 518); or ferrets (*R.* v. *Searing* (1818), Russ. & Ry. 350). Hawks, however, are to be included (1 Hale, P. C. 515); and see *Hannam* v. *Mockett*, *supra*, at p. 944. As to swans, see *Case of Swans*, *supra*. Tame pigeons are protected by statute (Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23); see *R.* v. *Cheafor* (1851), 2 Den. 361, C. C. R.; and see, generally, title ANIMALS, Vol. I., pp. 368 *et seq.*

(*n*) *Case of Swans*, *supra*, *per* Sir E. COKE, at p. 17 b. "If a man has young shovelers or goshawks or the like, which are *ferœ naturœ* and they build in my land, I have possessory property in them, for if anyone takes them when they cannot fly, the owner of the soil shall have an action of trespass *quare boscum suum fregit et tres pullos espervorum suorum cepit et asportavit.* As to young pheasants, see *R.* v. *Cory* (1864), 10 Cox, C. C. 23, *per* CHANNELL, B., at p. 24: "These pheasants having been hatched by hens and reared in a coop, were tame pheasants at the time they were taken whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and injury for stealing them would be of precisely the same nature as if the birds had been common fowls or

SECT. 1. **Nature and Extent of Rights.**

But so soon as the game has gained or regained its freedom and ability to stray at will, the property of the owner of the soil at once becomes qualified instead of absolute (*o*).

Right of property in eggs of game birds.

454. The right of property in the eggs of game birds rather curiously follows the principle of the right over game in general, instead of that of the right over young or captive game, that is to say, the property in them is qualified, not absolute.

In order that the property may be absolute the eggs must first have been collected from the nests or otherwise reduced into possession (*p*). The taking of eggs from the nests of wild birds does not therefore amount to larceny (*q*), but, as in the case of game generally, the qualified right of property receives recognition and support from provisions of the game laws which create special offences in the case of taking or destroying the eggs of certain birds, and thereby protect them against trespassers (*r*).

SECT. 2.—*Rights in Privileged Places.*

Right to game *ratione privilegii*.

455. In certain cases the right to kill or take game may be claimed *ratione privilegii* without reference to the occupation of the land on which the game is found. Such a right is a franchise having its origin in a grant made by the Crown in exercise of the royal prerogative (*s*). The grantee has the exclusive right of

any other poultry, the character of the birds in no way affecting the law of the case, but only the question of identity." So, too, when young partridges were reared by a hen, they were held to be the subject of larceny so long as they remained with the hen, even though she was allowed to wander about her owner's premises at will (*R.* v. *Shickle* (1868), L. R. 1 C. C. R. 158; see also *R.* v. *Garnham* (1861), 8 Cox, C. C. 451; *R.* v. *Head* (1857), 1 F. & F. 350).

(*o*) *Case of Swans* (1592), 7 Co. Rep. 15 b; and see note (*n*), p. 213, *ante*. It is an offence punishable by a fine not exceeding £2 to kill, wound, or take a house dove or pigeon under circumstances that do not constitute larceny (Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23); but this provision does not apply where notice is given and the bird has done damage (*Taylor* v. *Newman* (1863), 4 B. & S. 89); see also pp. 227, 228, *post*.

(*p*) *R.* v. *Stride and Millard*, [1908] 1 K. B. 617, C. C. R.

(*q*) *Ibid.*, *per* Lord ALVERSTONE, C.J., at p. 627. In this case the words "one thousand pheasants' eggs of the goods and chattels of and of and belonging to W. G." were held to be a sufficient averment that the eggs were the subject of larceny, although the indictment contained no allegation that the eggs had been reduced into possession; see p. 239, *post*. Taking eggs of game birds that are tame or in captivity would no doubt amount to larceny, but it would be necessary in the absence of an averment of reduction into possession to state in the indictment that they were the eggs of a tame or captive bird (*ibid.*, *per* Lord ALVERSTONE, C.J., at p. 626; *R.* v. *Gallears* (1849), 1 Den. 501, C. C. R.).

(*r*) The Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 24, provides penalties for destroying or taking the eggs of "game," swan, wild duck, teal or widgeon. The Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 1, includes within its protection as "game," the eggs of pheasants, partridges, grouse and black game or moor game; see p. 236, *post*. As to the protection afforded to the eggs of other wild birds by the Wild Birds Protection Act, 1894 (57 & 58 Vict. c. 24), see title ANIMALS, Vol. I., p. 408.

(*s*) *Devonshire (Duke)* v. *Lodge* (1827), 7 B. & C. 36; *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, *per* Lord WESTBURY, L.C., at p. 631. As to the nature of franchises in general, see title CONSTITUTIONAL LAW, Vol. VI., p. 489. Such a right cannot be claimed by a class of persons who are not a corporation (*Gateward's Case* (1607), 6 Co. Rep. 59 b; see also *Chilton* v. *London Corporation*

SECT. 2. Rights in Privileged Places.

killing the game found on the land to which the grant applies, whether he is the owner of such land or not. Such a right may be established either by express grant or by prescription (*t*). The places in which such rights exist are forests and their purlieus, chases, parks and warrens (*a*).

Beasts of forest etc.

The beasts of forest, chase, and park include the various species of deer (*b*).

Beasts of warren.

Beasts and fowls of warren include hares, rabbits, roedeer, partridges, rails, quails, pheasants, woodcock, heron, and mallard (*c*). They do not include grouse (*d*).

There seems to be authority for including not only the above, but plover and larks as birds of warren (*e*).

Rights of lord of manor over waste lands.

The right of the lord of the manor to shoot game on the waste land of the manor is not a liberty nor an easement, but an incident of his property; he has the same right in respect of the waste as he has over his other demesne lands (*f*).

Where the waste lands of a manor have been inclosed, the question in whom the sporting rights over the inclosed lands are vested is one of construction of the provisions of the Inclosure Act under which the inclosure was made. If the waste lands have been allotted to the commoners as their freehold, *primâ facie* the right of sporting belongs to them as incident to their property in the soil, and the burden of proof is on the lord of the manor to show that it has been reserved to or conferred upon him by the statute. A reservation of sporting rights is to be construed most strictly against the party claiming under it, because it is in derogation of the right of freehold which is given to the allottees. Nothing short of a positive reservation of such rights over the inclosed lands, either in express terms or by necessary implication, will suffice. The mere reservation of manorial rights will not have this effect, for the lord of the manor as such has no right of sporting over all lands within the manor, and his right of sporting over the waste lands is not a manorial right, but a right which is incident to his ownership of the soil of

(1878), 7 Ch. D. 735; *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633).

(*t*) As to prescription generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. X., pp. 257, 264, 268.

(*a*) For the meaning of these terms, see Manwood, Forest Laws, 3rd ed., Ch. I., and title CONSTITUTIONAL LAW, Vol. VI., p. 489, and *ibid.*, Vol. VII., p. 181, where the nature and extent of the privileges which exist in such places are fully discussed.

(*b*) Co. Litt. 233.

(*c*) The list is that given in Co. Litt. 233 a, where the fowls of warren are divided into *terrestres* and *aquatiles*, and the *terrestres* are sub-divided into *campestres* and *silvestres*, the particular birds' names in each case being followed by the word "etc.," so that the list is not exhaustive. As to wild duck, see *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139; compare 2 Bl. Com., 14th ed., p. 38, n. (b).

(*d*) *Devonshire* (*Duke*) v. *Lodge* (1827), 7 B. & C. 36.

(*e*) Introduction to "Select Pleas of the Forest," pp. 129—131 (Selden Society, Vol. XIII.).

(*f*) *Greathead* v. *Morley* (1841), 3 Man. & G. 139; compare *Rigg* v. *Lonsdale* (*Earl*) (1857), 1 H. & N. 923, Ex. Ch. As to the peculiar powers of a gamekeeper appointed by the lord of a manor in respect of trespassers in pursuit of game, see pp. 244, 245, *post*.

SECT. 2. Rights in Privileged Places.

such lands (*g*). But a reservation clause may be so worded as to reserve to the lord his previously existing right of sporting over the lands which are inclosed under the Act (*h*).

Part IV.—Persons having Rights over Game.

SECT. 1.—*In General.*

Rights of occupier of land.

456. In all places other than those which are the subject of a privilege (*i*) the rights over the game are *primâ facie* in the occupier of the land, because he has possession of the soil, and his rights are infringed by the presence there of another without his leave. The occupier must be either the owner if the land is not let, or, if the land is let, the tenant. *Primâ facie*, therefore, the rights over game are in the owner where the owner occupies his own land and in the tenant when the owner lets. But both these parties can part with their rights over the game to a third party, commonly called the shooting tenant.

Reservation by landlord.

A landlord who lets his land may nevertheless reserve to himself the rights over game, and, having reserved those rights, may either exercise them himself or grant them to a shooting tenant. In the result, therefore, while the rights over game are in the occupier in theory, in practice they are frequently alienated from him, so that there are three persons whose rights over the game on any particular piece of land have to be considered, namely, the owner, the shooting tenant, and the occupying or agricultural tenant.

SECT. 2.—*Rights of the Owner.*

SUB-SECT. 1.—*Occupying Owner.*

Rights of occupying owner.

457. The simplest case is where the owner occupies his own land and retains the rights over the game in his own hand.

Here there arise no conflicting rights, and, subject to the general

(*g*) *Sowerby* v. *Smith* (1874), L. R. 9 C. P. 524, Ex. Ch.; *Devonshire* (*Duke*) v. *O'Connor* (1890), 24 Q. B. D. 468, C. A.; see also *Robinson* v. *Wray* (1866), L. R. 1 C. P. 490.

(*h*) *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331 (reservation of "all right of hunting, shooting, fishing, and fowling on, through, and over the inclosed lands" held not to be confined to mere manorial rights); *Hilton and Walkerfield* (*Townships*) *Overseers* v. *Bowes* (*Township*) *Overseers* (1866), L. R. 1 Q. B. 359; *Leconfield* (*Lord*) v. *Dixon* (1867), L. R. 3 Exch. 30, Ex. Ch. (reservation of "fishing, hunting, hawking, fowling, and all beasts and birds considered as game . . . in the same and as full, ample, and beneficial manner as they now are held, taken, and enjoyed" held to include the lord's right to the game whether arising from his ownership of the soil or otherwise); *Musgrave* v. *Forster* (1871), L. R. 6 Q. B. 590. See also titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 501, 576; COPYHOLDS, Vol. VIII., pp. 25, 26.

(*i*) As to which, see pp. 214 *et seq.*, *ante*.

provisions made by the State in the interests of game and wild birds (*k*) and to the possession of a game licence (*l*), the owner is in a position to kill and take the game upon his own land at whatever time and in whatever manner he prefers (*m*).

Where the owner occupies his own land, but grants the rights over game etc. to another, that other, the shooting tenant, may exercise the rights so granted in the same manner and to the same extent as the owner himself, save that he enjoys no right of killing hares without a licence (*n*).

The owner, however, retains as occupier a concurrent right to kill ground game (*o*).

SUB-SECT. 2.—*Non-occupying Owner.*

Non-occupying owner

458. If the owner does not occupy his own land, but lets it to a tenant, the rights over game may or may not be reserved. Where they are not reserved, they pass in every case, with the possession of the land, to the tenant (*p*). A tenant who acquires his rights in this way is subject to the restriction that he cannot shoot rabbits by night nor set traps outside rabbit holes (*q*). To this extent he is in a worse position than a tenant who has shooting rights expressly granted to him by the owner (*r*).

Reservation of rights in game by lessor.

459. The power to reserve a right of entry on the land to the owner or any other person is expressly saved by statute (*s*); and the reservation may be effected either by a covenant in the lease or by a separate contract (*t*); but the reservation need not be made by

(*k*) See pp. 209 *et seq.*, *ante*.

(*l*) See pp. 246 *et seq.*, *post*.

(*m*) Except that he may not use firearms for the purpose at night (Hares Act, 1848 (11 & 12 Vict. c. 29), s. 5); see p. 210, *ante*.

(*n*) Such right is confined to persons in actual occupation and owners with the right of killing the game (Hares Act, 1848 (11 & 12 Vict. c. 29), s. 1); and see p. 248, *post*.

(*o*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 7.

(*p*) *Anderson* v. *Vicary*, [1900] 2 Q. B. 287, C. A. As to the rights of the occupier in respect of ground game, see p. 221, *post*. This is in accordance with the common law doctrine as to rights arising out of the land. The rule was finally established by the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 7, which expressly reserved to the landlord all rights over game in the case of all existing leases except where the rights were specifically granted to the tenant or where the lease was for more than twenty-one years. But it left all future leases to be governed, except where the game was specifically reserved (see note (*t*), *infra*), by the general law of trespass. In Scotland a precisely contrary principle obtains; for there the right over the game is considered a right personal to the owner of the land (*Saunders* v. *Pitfield* (1888), 58 L. T. 108).

(*q*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6. Rabbit hole has been defined by the Scottish Court of Session as meaning that part which is covered by the roof, and not the ground which is scraped away outside (*Brown* v. *Thomson* (1882), 9 R. (Ct. of Sess.) 1183). It does not mean a hole scooped out under a wire fence with no roof of soil (*Fraser* v. *Lawson* (1882), 10 R. (Ct. of Sess.) 396).

(*r*) *May* v. *Waters*, [1910] 1 K. B. 431; *Waters* v. *Phillips*, [1910] 2 K. B. 465.

(*s*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 8.

(*t*) The usual method is to insert a covenant in the lease creating the tenancy, but the right of entry may be contained in any deed, grant, lease or any written or parol demise or contract. For forms of reservation and covenant, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 508, 512, 516, 518 *et seq.*; and as to leases, generally, see title LANDLORD AND TENANT.

SECT. 2. Rights of the Owner.

deed; a verbal reservation is sufficient (*a*). A reservation is to be construed strictly against the person claiming under it (*b*).

A reservation to the lessor of the exclusive right of sporting is void in so far as it applies to ground game (*c*), but such a reservation is severable, and in so far as it applies to any other than ground game it is valid (*d*). The right to the game being regarded as a right arising out of the land, such a covenant for reservation of the sporting rights may be sued on by an assignee of the reversion (*e*).

Liability of tenant.

The reserved right is defended by provisions which make it an offence for the tenant in such a case to kill or take the game or to permit anyone else to do so (*f*). In the case, however, of a tenancy created since 1880 the landlord cannot by any reservation of the sporting rights deprive the tenant of the right to kill ground game (*g*)

Rights of tenant under Ground Game Acts.

Hence, when the rights are reserved, the owner himself or any person to whom he may grant them may exercise such rights to the same extent and precisely as if he were himself the occupier of the land except for such rights over the ground game as are given to the tenant by the Ground Game Acts (*h*); and such claim as the tenant may have in respect of damage caused by game (*i*).

(*a*) *Jones* v. *Williams* (1877), 46 L. J. (M. C.) 270; and see *R.* v. *Thurlstone* (*Inhabitants*) (1859), 1 E. & E. 502.

(*b*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 441. As to the construction of such reservations, see *Moore* v. *Plymouth* (*Lord*) (1817), 7 Taunt. 614 (liberty of "hunting" does not include shooting feathered game); *Wickham* v. *Hawker* (1840), 7 M. & W. 63 (a conveyance of land by A. and B. to D., excepting and reserving the sporting rights to A., B., and C., is not a reservation, but a new grant by D.); *Jeffryes* v. *Evans* (1865), 19 C. B. (N. S.) 246 (reservation of the right of "shooting and sporting" is not limited to game strictly so called); *Coleman* v. *Bathurst* (1871), L. R. 6 Q. B. 366 (a covenant by the tenant that he would not destroy the game held not to amount to an implied reservation of the game to the landlord); *Houstoun* v. *Sligo* (*Marquis*) (1886), 55 L. T. 614, H. L. (exception of shooting "by way of grant and not of reservation" construed as a re-grant by the tenant to the landlord).

(*c*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 3.

(*d*) *Stanton* v. *Brown*, [1900] 1 Q. B. 671. As to the right of the tenant to recover damages from the shooting tenant in respect of injury caused to his crops by the land being overstocked with game, see *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258.

(*e*) *Hooper* v. *Clark* (1867), 8 B. & S. 150. A condition of re-entry, if the tenant is guilty of an offence against the game laws, does not go with the reversion, as that is not a covenant arising out of the land (*Stevens* v. *Copp* (1868), L. R. 4 Exch. 20).

(*f*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 12; see p. 231, *post*. The tenant in such a case can actually be convicted of trespassing in pursuit of game (*Liversedge* v. *Whiteoak* (1893), 57 J. P. 692). Game is to be understood in the strict sense of the definition in the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 2 (see p. 208, *ante*). Neither the tenant nor anyone acting under his direction is liable to be prosecuted under s. 30 (*ibid.*; see p. 229, *post*) for trespass, so that the animals and birds mentioned in that section which are not "game" can be killed by the tenant without risk of prosecution (*Spicer* v. *Barnard* (1859), 1 E. & E. 874; *Padwick* v. *King* (1859), 7 C. B. (N. S.) 88).

(*g*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 3. This, however, is subject to the restriction contained in s. 6 (*ibid.*).

(*h*) See p. 221, *post*.

(*i*) See p. 224, *post*.

SECT. 2. Rights of the Owner.

No doubt an agreement reserving the right to kill the "game" would be strictly limited to the right to kill those birds or animals which are within the definition of game in the Game Act, 1831 (*j*), but the more usual agreement reserving the shooting or sporting rights has the effect of reserving the right to kill all things which are usually the object of sport (*k*).

Effect of reservation.

A covenant that the tenant shall not destroy the game does not have the effect of reserving the right of killing it to a landlord who does not reserve the right of entry for that purpose (*l*).

SECT. 3.—*Rights of a Shooting Tenant.*

Rights of shooting tenant.

460. The shooting tenant may have obtained his right either (1) from an occupying owner (*m*), or (2) from an owner who has let his land, but reserved his shooting rights (*n*), or (3) from an occupying tenant where the rights have not been reserved (*o*).

In all these cases the shooting tenant may have either the right to shoot the game or else general shooting and sporting rights (*p*). Subject to this he takes in cases (1) and (2) precisely those rights that the owner himself would have had. In case (1), however, the owner retains his rights as occupier under the Ground Game Act (*q*). An occupying owner or tenant who infringes the rights of his shooting tenant by pursuing, killing, or taking the game commits an offence for which he may be prosecuted (*r*); but an owner not in occupation who does so is merely liable to a civil claim for breach of contract.

The right to kill and carry away game is not a mere licence, but a *profit à prendre* (*s*), and, being an incorporeal hereditament, can only be granted by deed (*t*). An agreement for the enjoyment of

(*j*) 1 & 2 Will. 4, c. 32, s. 2; see p. 208, *ante*.

(*k*) *Jeffryes* v. *Evans* (1865), 19 C. B. (N. S.) 246. Where under an old deed dated 1655 the right of hawking and hunting was reserved, it was decided that the reservation did not cover the shooting of feathered game with a gun (*Moore* v. *Plymouth* (*Lord*) (1817), 7 Taunt. 614). While a tenant who infringes the reserved rights of killing game in the strict sense of the definition commits an offence (see note (*f*), p. 218, *ante*), a tenant who kills other birds, the right to which may have been reserved, is only liable to an action for breach of the covenant or agreement.

(*l*) *Coleman* v. *Bathurst* (1871), L. R. 6 Q. B. 366.

(*m*) For forms of sporting leases from owners, see Encyclopædia of Forms and Precedents, Vol. VII., p. 613; and as to the stamps thereon, see titles LANDLORD AND TENANT; REVENUE.

(*n*) For a form of sporting lease from an owner who is not the occupier, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 622 *et seq.*

(*o*) For a form of sporting lease from an occupier, see *ibid.*, p. 620.

(*p*) See note (*b*), p. 218, *ante*, and note (*k*), *supra*.

(*q*) *Anderson* v. *Vicary*, [1900] 2 Q. B. 287, C. A.

(*r*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 12. But the shooting tenant who prosecutes must prove strictly his right to the game by production of the deed granting it to him (*Barker* v. *Davis* (1865), 34 L. J. (M. C.) 140).

(*s*) *Wickham* v. *Hawker* (1840), 7 M. & W. 63; *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331; *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A.; *Lowe* v. *Adams*, [1901] 2 Ch. 598; and see, generally, titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 336.

(*t*) *Bird* v. *Higginson* (1837), 6 Ad. & El. 824, Ex. Ch.; *Brigstocke* v. *Rayner* (1875), 40 J. P. 245. But a lessee who has had the benefit of a lease which is not under seal cannot set up the want of a seal as a defence to an action on the covenants of the lease (*Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403; compare

SECT. 3. Rights of a Shooting Tenant.

such a right is a contract for an interest in land within s. 4 of the Statute of Frauds (*a*).

461. Apart from any special covenant in his agreement, the right which a shooting tenant acquires is the right to shoot over the lands as they happen to be at the time (*b*).

Variation of rights during tenancy.

The usual covenant for quiet enjoyment in such an agreement does not prevent the owner or occupier from converting arable into pasture land, or *vice versâ* (*c*), nor from grubbing up grass (*d*) or cutting timber in the ordinary course of management of the estate (*e*).

A shooting tenant cannot prevent his landlord from putting up a part of the land for auction to be sold as building lots, subject to the right of shooting, where it does not appear that the sale must inevitably injure the shooting tenant's rights (*f*). But the lessor must not, of course, do anything for the express purpose of injuring the rights of shooting (*g*).

Protection of rights.

Where an accident, such as fire, threatens damage to his shooting rights, the shooting tenant is entitled to take such means on the land as will protect his rights, if he can show that they cannot otherwise be protected (*h*).

SECT. 4.—*Rights of an Agricultural Tenant.*

SUB-SECT. 1.—*In General.*

Rights of agricultural tenant.

462. An agricultural tenant in occupation of land on which the sporting rights are not reserved has the same rights over game etc. as an owner in occupation (*i*), save that he may not kill rabbits at night with a gun nor employ spring traps, except in rabbit holes (*j*). This restriction does not, however, apply where he has had the right to kill and take rabbits expressly conferred upon him (*k*).

He may grant his rights to a shooting tenant, including the right to take and kill the ground game (*l*); but such grant will not

Thomas v. *Fredricks* (1847), 10 Q. B. 775). Where there is an agreement (not under seal) for the letting of shooting rights, a landlord may be restrained from interfering with the exercise of the shooting rights pending the execution of a lease (*Frogley* v. *Lovelace* (*Earl*) (1859), 1 John. 333). By Scottish law such a grant need not be made under seal (*ibid.*). In Ireland, also, the law does not require a deed (*Radcliff* v. *Hayes*, [1907] 1 I. R. 101).

(*a*) Statute of Frauds (29 Car. 2, c. 3); *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A.; see titles CONTRACT, Vol. VII., p. 361; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 378; LANDLORD AND TENANT. As to the notice which is necessary to terminate the agreement where the shooting tenant has continued to enjoy the shooting rights after the expiration of the period originally fixed, see *Lowe* v. *Adams*, [1901] 2 Ch. 598.

(*b*) *Gearns* v. *Baker* (1875), 10 Ch. App. 355.

(*c*) *Jeffryes* v. *Evans* (1865), 19 C. B. (N. S.) 246.

(*d*) *Ibid.*

(*e*) *Gearns* v. *Baker*, *supra*.

(*f*) *Pattisson* v. *Gilford* (1874), L. R. 18 Eq. 259.

(*g*) *Gearns* v. *Baker*, *supra*.

(*h*) *Cope* v. *Sharpe*, [1910] 1 K. B. 168; and compare S. C. (1911), *Times*, 12th January.

(*i*) See p. 216, *ante*.

(*j*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6; *Saunders* v. *Pitfield* (1888), 58 L. T. 108; and see p. 217, *ante*.

(*k*) *May* v. *Waters*, [1910] 1 K. B. 431; *Waters* v. *Phillips*, [1910] 2 K. B. 465.

(*l*) *Morgan* v. *Jackson*, [1895] 1 Q. B. 885.

preclude him from exercising his concurrent right to kill ground game himself (*m*).

SECT. 4. **Rights of an Agricultural Tenant.**

463. An agricultural tenant in occupation of land on which the sporting rights have been reserved has certain rights in regard to game secured to him.

Where sporting rights reserved.

These rights have been granted by statute in the interests of good husbandry and for the better security of the capital and labour invested by the occupier of land in the cultivation of the soil (*n*).

They comprise direct rights in the case of ground game, and indirect rights in the case of game generally.

Agricultural tenant's rights to ground game.

Such rights are conferred in the one case by the Ground Game Acts (*o*), and in the other by the Agricultural Holdings Act, 1908 (*p*).

SUB-SECT. 2.—*Under the Ground Game Act*, 1880.

464. The right of the tenant under the Ground Game Acts (*o*) is the right to kill and take ground game on the land in his occupation, whether or not any other person is entitled also to kill and take ground game on the same land (*q*). The right is incident to and inseparable from his occupation, so that he cannot be divested of it in any way (*r*). Any agreement, condition, or arrangement is void (*s*) which purports to alienate it from him or which gives him any advantage in consideration of his forbearing to exercise it or imposes any disadvantage upon him in consequence of his exercising it.

Effect of Ground Game Acts on tenant.

465. The right is granted expressly to occupiers as such. Hence, if a tenant sublets his land, he parts with the right and the sub-lessee acquires it for the duration of the sub-lease. The right to kill ground game on land is withheld from anyone who merely has a right of common over it (*a*), and from anyone who is in occupation for the purpose of the grazing or pasturage of sheep, cattle or horses, for a period of nine months or less (*b*).

Rights of sub-lessee.

(*m*) *Morgan* v. *Jackson*, [1895] 1 Q. B. 885, *per* WRIGHT, J., at p. 887.
(*n*) See preamble to Ground Game Act, 1880 (43 & 44 Vict. c. 47).
(*o*) *Ibid.*; Ground Game (Amendment) Act, 1906 (6 Edw. 7, c. 21).
(*p*) 8 Edw. 7, c. 28.
(*q*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1.
(*r*) *Ibid.*, ss. 1, 3, 7.
(*s*) *Ibid.*, s. 3. The wording of the section is sufficiently wide to suggest a doubt whether the effect of such a covenant in a lease would not be to render the whole lease void, but it has been held that where by a lease the exclusive right of sporting is reserved the lease is void only in so far as it purports to deprive the occupier of the right to kill and take ground game (*Stanton* v. *Brown*, [1900] 1 Q. B. 671). Where a tenant agreed with his landlord to leave the ground game unshot in his landlord's interest, on the faith of a promise by the landlord to compensate him for the damage done by the ground game, and where the tenant sued for compensation under the agreement, it was held that the agreement was void and that he could not recover (*Sherrard* v. *Gascoigne*, [1900] 2 Q. B. 279; and see *Beardmore* v. *Meakin* (1884), 20 L. J. N. C. 8). *Quære* whether an arrangement between the occupier and the person having the shooting rights, which merely settles the mode in which the occupier should exercise his rights, can be made.
(*a*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (2); Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 10; compare *Cooper* v. *Marshall* (1757), 1 Burr. 259.
(*b*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (2). The precise language

SECT. 4. Rights of an Agricultural Tenant.

Agricultural tenant's rights over moorlands and uninclosed non-arable land.

466. In the case of moorlands and uninclosed non-arable land, except detached portions of either which are less than twenty-five acres in extent and adjoin arable lands, the time at which the right of the agricultural tenant to kill ground game may be exercised is limited. Between the 11th December of one year and the 31st March (both inclusive) of the succeeding year the right may be exercised and ground game may be killed in any legal way (*c*). Between the 1st April and the 31st August (both inclusive) the right is suspended altogether, but between the 1st September and the 10th December (both inclusive) of any year the right may be exercised otherwise than by the use of firearms (*d*), and as between those dates a valid agreement may be made between the occupier and the owner or shooting tenant for the joint exercise of the right or for its exercise for their joint benefit (*e*).

Moreover, tenants in occupation of lands on which the right to take and kill ground game is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration before the 7th September, 1880 (*f*), in some other person, are not entitled to exercise their right until the determination of that contract (*g*), and in places where before the 7th September, 1880, any person other than the landlord, lessor, or occupier became entitled by virtue of any franchise, charter, or Act of Parliament to a special right of killing or taking ground game, the tenant is precluded from any action that might affect such special right.

Who may exercise right.

467. In all places the exercise of the right is confined to the occupier and to persons duly authorised by him in writing (*h*).

Rights of joint tenants.

Where there are joint tenants, each of them is at liberty to exercise the right (*i*), but if they authorise other persons presumably they must do so jointly.

Requirements of authority.

The written authority need not be in any prescribed form (*k*), and there is no provision requiring it to be either signed or dated, but it should state the name of the person authorised and indicate the place in regard to which the authority is given (*l*). Every person

of this exception leaves in some doubt the question whether it covers occupation for the purpose of grazing of other animals, as, for instance, goats or pigs.

(*c*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (3).

(*d*) Ground Game (Amendment) Act, 1906 (6 Edw. 7, c. 21), s. 2.

(*e*) *Ibid.*, s. 3.

(*f*) The date of the passing of the Ground Game Act, 1880 (43 & 44 Vict. c. 47.).

(*g*) *Ibid.*, s. 5. When a tenant held land under a tenancy from year to year, but there was an agreement made before the 7th September, 1880, for a fourteen years' lease to be granted at the expiration of the tenancy, and that lease contained a covenant reserving rights over ground game to the landlord, it was held that the rights to the ground game remained vested in the landlord until the expiration of the fourteen years' lease (*Allhusen* v. *Brooking* (1884), 26 Ch. D. 559; compare *Hassard* v. *Clark* (1884), 13 L. R. Ir. 391).

(*h*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (1). A person who kills ground game on the verbal instruction only of the occupier is a trespasser; compare *Richardson* v. *Maitland* (1897), 34 Sc. L. R. 426 (a Scottish case).

(*i*) Compare *Assessed Tax Appeal Case* (1473).

(*k*) For a form of authority, see Encyclopædia of Forms and Precedents, Vol. VII., p. 630.

(*l*) *Primâ facie* the authority will no doubt be deemed to be given by a person

SECT. 4. Rights of an Agricultural Tenant.

so authorised by the occupier may be required by any person having a concurrent right to take and kill the ground game on the land, or by any person authorised by the latter in writing (*m*), to produce the document giving him authority, and if he fails to do so he will not be deemed to be an authorised person (*n*).

Who may be authorised.

The persons who may be authorised are (*o*):—(1) members of the occupier's household (*p*) resident (*q*) on the land in his occupation (*r*); (2) persons in his ordinary service on such land (*s*); (3) any one other person (*t*) *bonâ fide* employed by him for reward (*a*) in the taking and destruction of ground game.

Only one other person besides the occupier himself may be

having a right to do so, and to be valid at the date on which it is relied on, but if these questions are disputed, and the holder is proceeded against for trespass, they will be facts to be decided by the magistrate. The same applies to the name of the person authorised and the place, but if they are not stated, or if, for instance, the authority is to "bearer," production of the document would be rendered nugatory.

(*m*) For a form of authority, see Encyclopædia of Forms and Precedents, Vol. VII., p. 631.

(*n*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (1) (c).

(*o*) *Ibid.*, s. 1 (1) (b).

(*p*) The household will include household servants, namely, those who live and board at his house, but presumably not such as live in other houses on the farm; compare *Re Drax*, *Savile* v. *Yeatman* (1887), 57 L. T. 475; *Ogle* v. *Morgan* (1852), 1 De G. M. & G. 359.

(*q*) A man's residence has been described as the place where he eats, drinks, and sleeps, or where his family or servants eat, drink, or sleep (*R.* v. *North Curry (Inhabitants)* (1825), 4 B. & C. 953, *per* BAYLEY, J., at p. 959). This is a general definition only, and a resident will include a visitor staying in the house, but presumably not one who comes for a day only and does not sleep or eat more than one meal or so there. The question is one of fact in each case, but a person invited to stay for a week and shoot rabbits was held by a Scottish court to satisfy the condition (*Stuart* v. *Murray* (1884), 12 Rettie (Justiciary Cases), 9). It is not necessary that the occupier should reside there himself; compare *R.* v. *North Curry (Inhabitants)*, *supra*.

(*r*) This would seem to limit the authority given to this class of person to the farm on which they were resident, so that when a tenant held two or more farms the household resident on each could take and kill the ground game on that farm, but not on the others. There is a limit to the number of persons in this class.

(*s*) Ordinary service presumably means regular service, so that casual labour taken on for a week or two, as for harvest, would be excluded. Moreover, servants who, however regularly employed, do not find their customary work on the land would also be excluded. There is otherwise no limit to the number of persons who might be included in this class.

(*t*) This class may include a person who is not in the household or regular employment of the occupier, but only one person at a time can be so employed.

(*a*) This introduction of a stranger on to the land is dissociated from any idea of sport to be had out of killing the ground game. It must be a business transaction. The person contemplated is a professional rabbit-catcher. It is possible, no doubt, that a friend or servant might be employed if he were definitely paid for it, but whereas in the case of the rabbit-catcher the fact of his being allowed to keep all or some of the rabbits taken would probably be considered *bonâ fide* employment for reward (compare *Bruce* v. *Prosser* (1898), 35 Sc. L. R. 433 (commented on in (1899) 62 J. P. 466), where it was so decided by the Scottish courts), a similar gift to a friend asked to come and shoot could hardly be so construed. Definite employment for the purpose is required; verbal instructions are insufficient; see note (*h*), p. 222, *ante*; compare *Richardson* v. *Maitland* (1897), 34 Sc. L. R. 426 (a Scottish case).

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authorised by him to exercise his rights by killing the ground game with firearms (*b*).

SUB-SECT. 3.—*Under the Agricultural Holdings Act*, 1908.

Compensation to tenant for damage by game.

468. In addition to the protection from damage by hares and rabbits which is given to an agricultural tenant by the right to shoot them under the Ground Game Act, 1880 (*c*), he is entitled to compensation in certain cases for damage done to his crops by deer, pheasants, partridges, grouse, and black game (*d*). This right is limited to the ordinary case where the right to kill and take the game is not vested in the tenant or anybody (other than the landlord) claiming under him, and where the tenant has not his landlord's written permission to kill it (*e*).

Any agreement between a landlord and a tenant which purports to negative or limit this right to compensation is void (*f*).

Compensation is only payable if the damage done exceeds in amount the sum of 1*s*. per acre of the area over which the damage extends (*g*).

The amount of compensation for such damage, if not settled by mutual agreement made after the damage is done, is to be determined by arbitration (*h*).

Notice to landlord of damage.

469. The landlord is entitled to receive notice in writing as soon as may be after the tenant has first observed the damage and to have a reasonable opportunity to inspect the damage. This opportunity must be given, in the case of a growing crop, before

(*b*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1 (1) (a).

(*c*) 43 & 44 Vict. c. 47, s. 1.

(*d*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 10. The animals and birds enumerated are those included in the definition of game for the purposes of this section (*ibid.*).

(*e*) Before the passing of this Act a tenant whose landlord had reserved the sporting rights could nevertheless maintain an action against him or the persons to whom the shooting rights were let for overstocking the land with game so as to damage his crops (*Farrer* v. *Nelson* (1885), 15 Q. B. D. 258; and see *Birkbeck* v. *Paget* (1862), 31 Beav. 403). The landlord is excepted for obvious reasons. He is said to claim under the tenant in consequence of the common law rule which makes the tenant of the soil the holder of the sporting rights, and which necessitates the insertion in leases of clauses reserving those rights (if the landlord desires to retain them) in accordance with the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 8; and compare p. 216, *ante*.

(*f*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 10 (1). Compare the similar provision with respect to an agreement depriving the tenant of his right to compensation for improvements in s. 5 (*ibid.*) and with regard to the right to kill ground game in the Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 3. Though the agreement is void for this purpose it may contain other provisions, and these are not avoided (*Morgan* v. *Jackson*, [1895] 1 Q. B. 885). Where the contract of tenancy was made before the 1st January, 1909, the date at which the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), came into operation, and the landlord proves that under such contract compensation for damage by game is payable by him or that in fixing the rent to be paid under such contract allowance in respect of such damage to an agreed amount was expressly made, the arbitrator must make such deduction from the compensation which would otherwise be payable under this provision as may appear just (*ibid.*, s. 10 (3)).

(*g*) *Ibid.*, s. 10 (1).

(*h*) *Ibid.*, s. 10 (2). As to arbitration, see title ARBITRATION, Vol. I., pp. 437 *et seq.*

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the crop is begun to be reaped, raised, or consumed, and in the case of a crop reaped or raised, before it is begun to be removed from the land (*i*).

Notice in writing of the claim, together with particulars thereof, must also be given to the landlord within one month after the expiration of the calendar year (or such other period of twelve months as is by agreement between the landlord and tenant substituted therefor) in respect of which the claim is made (*k*).

If these conditions are not complied with the tenant cannot recover any compensation (*l*).

Landlord's right of indemnity.

470. Where the right to kill and take the game is vested in some person other than the landlord, the landlord is entitled to be indemnified by that other person against all claims for compensation for damage done by game (*m*).

Part V.—Remedies for Infringement of Rights.

SECT. 1.—*Civil.*

Nature of private rights over game.

471. Private rights over game, whatever their origin, are essentially local in character, and the principle upon which their security depends is that of the law of trespass (*n*).

Trespass.

Trespass is committed by any person who enters the land of another without authority to do so (*quare clausum fregit*) (*o*).

Right of action for trespass.

Such an act requires no motive, such as the search for or pursuit of game, to supply a ground of action to the injured party. But while the right of action is open to any occupier whose ground is trespassed on, it is of special importance to the holder of rights over game, as it is the means whereby the game on land in his occupation is protected from disturbance (*p*).

Remedies for trespass.

472. The ordinary remedy for trespass is an action by the aggrieved party, who can claim (1) an injunction to restrain the alleged trespasser from committing further acts of trespass, (2) a declaration of his (the plaintiff's) rights, and (3) damages (*q*). Entry on land by any unauthorised person renders him liable to

(*i*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 10 (2).
(*k*) *I bid.*
(*l*) *I bid.*
(*m*) *I bid.*, s. 10 (4).
(*n*) See p. 212, *ante*; Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 6.
(*o*) *Cubitt* v. *Porter* (1828), 8 B. & C. 257; see, generally, title TRESPASS.
(*p*) *I.e.*, if he is an occupier. A shooting tenant (not in occupation) cannot bring such an action unless the occupier is joined as plaintiff; but his rights are protected by the provisions of the Game Act (see p. 208, *ante*); see p 228, *post*.
(*q*) Damages are as a rule only awarded to the extent to which the aggrieved party has actually suffered loss, but where the trespass is aggravated by wilful annoyance or other special circumstances, they may be given on a more generous scale (*Merest* v. *Harvey* (1814), 5 Taunt. 442, where £500 were awarded, not in consequence of the damage done, but expressly on account of the attendant circumstances, the defendant having persisted in joining a shooting party unasked).

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such an action. If, therefore, a person standing on his own ground shoots game which falls upon his neighbour's land, he cannot enter that neighbour's land to gather it without committing an act of trespass (*r*); or, again, if a person while hunting enters on the land of another without his consent, he commits an act of trespass (*s*).

Nature of trespass.

Further, the entry need not be personal in order to be actionable. A man who himself does not enter, but invites or authorises others to do so, is liable to an action for trespass (*t*). So, too, is the mere firing of a gun into the land of another (*a*), or the sending of a dog on to such land in pursuit of game (*b*).

Limits of public right over highway.

The right of the public over a highway is limited to the use of the highway for the purpose of passing and repassing thereon, so that a trespass may be committed if the highway is used for any other purpose (*c*). Consequently the owner of land adjoining the highway who is also owner of the soil of the highway may employ all the means at his disposal for resisting a trespass there that he might use in the case of any land in his occupation (*d*).

Injury to game rights without entry on land.

It is possible also for one man without entering upon the land of another to injure that other's right to the game then on that land, but in order to succeed the injured party must prove that the act was a wrongful act and was done with the wilful intention of injuring his rights (*e*). It is not actionable to entice game away from the land of another, but it is so to scare them deliberately away from it (*f*).

Right to remove trespasser.

473. In addition to the right of action, trespass entitles the aggrieved party to remove the trespasser who declines to quit

(*r*) See *Tanton* v. *Jervis* (1879), 43 J. P. 784. But as to whether other proceedings can be taken, see p. 229, *post*.

(*s*) *Paul* v. *Summerhayes* (1878), 4 Q. B. D. 9; compare, however, *Gurndy* v. *Feltham* (1786), 1 Term Rep. 334, where it was said that an entry could be justified if no more was done than was necessary to kill the fox.

(*t*) *Robinson* v. *Vaughton* (1838), 8 C. & P. 252; *Baker* v. *Berkeley* (1827), 3 C. & P. 32, where a master of hounds was held liable for trespass committed by members of the hunt, unless he distinctly desired them not to enter the land. But one member of the hunt, not holding an official position, cannot be held liable for the trespass of other members (*Paget* v. *Birkbeck* (1863), 3 F. & F. 683).

(*a*) *Pickering* v. *Rudd* (1815), 4 Camp. 219. *Quære*, as to the firing of a gun over the land of another (*ibid.*).

(*b*) *R.* v. *Pratt* (1855), 4 E. & B. 860, *per* CROMPTON, J., at p. 868. The fact of allowing a dog, known to be addicted to chasing, to be at large near the lands of another would render the owner liable to an action for trespass if the dog in fact entered the land (*Read* v. *Edwards* (1864), 17 C. B. (N. S.) 245; and compare *Dimmock* v. *Allenby* (*circa* 1811), cited in *Deane* v. *Clayton* (1816), 2 Marsh. 577, at p. 582; *Brown* v. *Giles* (1823), 1 C. & P. 118), and, as to unauthorised trespass of dog generally, see title ANIMALS, Vol. I., p. 395, note (*t*).

(*c*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, C. A.; followed in *Hickman* v. *Maisey*, [1900] 1 Q. B. 752, C. A.; and approving *R.* v. *Pratt*, *supra*. As to rights over highways generally, see title HIGHWAYS, STREETS, AND BRIDGES.

(*d*) *Harrison* v. *Rutland* (*Duke*), *supra*.

(*e*) *Ibbotson* v. *Peat* (1865), 3 H. & C. 644. So, too, a man may be injured in his trade if he owns a decoy for wild duck, and the birds are wilfully scared by another with intent to injure him (*Keeble* v. *Hickeringill* (1706), 11 East, 574, n.). The intent to injure may be inferred from the circumstances in which the gun etc. was fired (*Carrington* v. *Taylor* (1809), 11 East, 571).

(*f*) *Ibbotson* v. *Peat*, *supra*.

his land provided that he does not use more force than is necessary (*g*).

Use of barbed wire.

474. An occupier of land may make use of barbed wire on his land, but if the barbed wire is so placed on land adjoining a highway that it may probably be injurious to persons or animals using the highway, it is a nuisance which the justices on application by the local authority may call upon the occupier to remove (*h*).

Spring guns and man-traps etc.

475. It is illegal to set or place, or cause to be set or placed, any spring gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm upon a trespasser or other person who may come in contact with it (*i*), but it is permissible to set dog spears and traps for the purpose of catching or excluding dogs or other animals addicted to hunting (*k*).

Use of bait for animal traps.

The use of poisoned flesh or grain is illegal (*l*), but there is nothing to prevent the use of flesh or grain that is not poisoned, or of other substances (*m*), as the bait for traps for such animals. Should the bait be of such a nature and so near a boundary as to attract animals which would not otherwise be likely to have entered the land, the occupier, or whoever set the bait or caused it to be set, may be liable to an action for the value of the animals destroyed, but if he has acted merely in defence of his property, he is not liable to criminal prosecution for malicious damage (*n*).

Liability for shooting tame or domestic animals.

476. The shooting of a tame or domestic animal renders the shooter liable to an action for its value, unless the shooter can show that he had no other means of protecting his property (*o*), but he is not liable to criminal prosecution for malicious damage (*p*) except in the case of a valuable animal such as a dog, when the shooter must show that he *bonâ fide* believed that he could protect

(*g*) See, generally, title TRESPASS, and *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, C. A.

(*h*) Barbed Wire Act, 1893 (56 & 57 Vict. c. 32).

(*i*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 31. To do so is a misdemeanour punishable with three years' penal servitude, or imprisonment, with or without hard labour, for two years. A person who, on coming into possession or occupation of land, permits such engines, set by his predecessor, to remain is liable to the same penalty (*ibid.*). See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 605.

(*k*) *Deane* v. *Clayton* (1817), 7 Taunt. 489; *Bird* v. *Holbrook* (1828), 4 Bing. 628; *Jordin* v. *Crump* (1841), 8 M. & W. 782; *R.* v. *Hill* (1884), 48 J. P. 743.

(*l*) Poisoned Grain Prohibition Act, 1863 (26 & 27 Vict. c. 113); Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115); and see p. 211, *ante*.

(*m*) The use of poison or a poisonous ingredient on land where game usually resort, or on a highway, is forbidden by the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3; see p. 211, *ante*.

(*n*) Under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 41; *Daniel* v. *Janes* (1877), 2 C. P. D. 351; *Bryan* v. *Eaton* (1875), 40 J. P. 213; compare *Townsend* v. *Wathen* (1808), 9 East, 277; and see title ANIMALS, Vol. I., pp. 396, 397.

(*o*) *Taylor* v. *Newman* (1863), 4 B. & S. 89; *Harper* v. *Michell* (1879), 44 J. P. 378; *Smith* v. *Williams* (1892), 9 T. L. R. 9.

(*p*) *Ibid.* In the case of house pigeons, if the circumstances are such as to bring the case within the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23, payment, made to the owner, of compensation satisfactory to him is no bar to a prosecution at the instance of any third party (*Smith* v. *Dear* (1903), 88 L. T. 664).

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his property by no less violent means (*q*). Where the animal is injured but not killed, the circumstances may constitute an offence against the Cruelty to Animals Act, 1849 (*r*), but they will not do so if there is no intention to torture the animal and no more is done than is necessary to frighten it away (*s*).

Distress *damage feasant.*

477. Trespassing animals may be distrained *damage feasant* if injury is done to animals which are the property of the distrainor (*t*), but the distrainor cannot bring an action for any part of the damage distrained for while he continues to hold the distress (*a*).

SECT. 2.—*Criminal.*

SUB-SECT. 1.—*Poaching by Day.*

Remedies for poaching.

478. The civil remedies for trespass are reinforced in the case of trespass in pursuit of game by the right to take criminal proceedings against an offender, and the right is conferred on those who have the rights over the game on the land as well as on the occupiers of it.

Persons having right to request trespasser to quit.

Thus, not only the occupier, but the person having the right to the game and the gamekeeper or other servants of either, are entitled to request a trespasser to quit their land, and in the event of his refusing to do so, or to give his name and address with a view to a summons being issued against him, they have power to arrest him (*b*); while in addition to the occupier's right of action there is given a right not only to the occupier, but to the owner of the soil (not in occupation), to the person having the right to the game, and to any informer, to prosecute the trespasser (*c*). Where, however, a prosecution has been instituted for trespass in pursuit of game by day no action can be brought against the offender for the same act of trespass by anyone at whose instance or with whose concurrence or assent the prosecution was begun (*d*).

Power to arrest.

Right to prosecute.

Trespassing by day.

479. It is an offence for any trespasser to enter or be upon any land in the daytime (*e*) in search or pursuit of game or woodcock,

(*q*) *Miles* v. *Hutchings*, [1903] 2 K. B. 714; and see *Vere* v. *Cawdor* (*Lord*) (1809), 11 East, 568. The gamekeeper appointed by a lord of a manor may seize, for the use of the lord, dogs used on the manor by persons in pursuit of game without a licence (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 13; and see p. 245, *post*).

(*r*) 12 & 13 Vict. c. 92, s. 2.

(*s*) *Armstrong* v. *Mitchell* (1903), 88 L. T. 870.

(*t*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608. See, generally, title ANIMALS, Vol. I., pp. 378 *et seq.*

(*a*) *Boden* v. *Roscoe*, *supra*.

(*b*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31; see p. 243, *post*.

(*c*) *Ibid.*, s. 30; *Midleton* v. *Gale* (1838), 8 Ad. & El. 155; *Morden* v. *Porter* (1860), 7 C. B. (N. S.) 641; see p. 232, *post*.

(*d*) Game Act, 1831 (1 & 2 Will. 4, c. 52), s. 46. In order to bar an action it is not necessary that the prosecution should be successful (*Robinson* v. *Vaughton* (1838), 8 C. & P. 252). There is no corresponding provision in the Night Poaching Acts, so that it would appear that a prosecution for poaching by night is no bar to an action.

(*e*) Daytime extends from the beginning of the last hour before sunrise to the close of the first hour after sunset (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 34). See note (*t*), p. 233, and note (*c*), p. 239, *post*, and title TIME.

snipe, quail, landrail or rabbits (*f*), and an offender is liable upon conviction before one or more justices of the peace to a penalty not exceeding £2 and the costs of the conviction (*g*). It is not necessary to prove that the search or pursuit was in order to kill game at the time (*h*). There must, however, be an actual entry by some person on the land (*i*).

To discharge a gun into or over the land of a neighbour is not therefore in itself a trespass in pursuit of game within this provision (*j*).

Bird rising on another's land.

Where, however, an entry is made on such land for the purpose of gathering a bird or beast named in the provision which, before being shot at, is on or rises from that land, an offence is committed (*k*).

Bird rising on shooter's own land.

If a bird rises on the shooter's own ground and is shot at by him while in the air, either over his own or his neighbour's land, and the shooter attempts to gather it on his neighbour's land, then if the bird is dead or at the point of death, so that no fresh effort is required to gather it, no criminal offence is committed (*l*), but it is otherwise if the bird is merely wounded (*m*). The same position would result in the case of ground game started on the shooter's own land and shot at by him before it crossed the boundary, and probably even if shot at after it crossed (*a*).

Shooting from neighbour's land.

A shooter who stands upon his neighbour's land to shoot game

(*f*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30. To enter and be upon any land constitutes one offence (*R.* v. *Mellor* (1833), 2 Dowl. 173).

(*g*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30. If the offender is tried before one justice only, the maximum penalty is £1 (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (7)). As to trial before justices generally, see title MAGISTRATES. As to penalties for refusing to give name and address when called upon by a gamekeeper etc., see p. 250, *post*.

(*h*) *Stiff* v. *Billington* (1901), 84 L. T. 467. Evidence that a gun was fired and the defendant left the wood where the firing took place with a gun and dog might be sufficient to convict him (*Burrows* v. *Gillingham* (1893), 57 J. P. 423), but where a man is seen trespassing and his intention is open to doubt it is in the discretion of the justices whether to convict him or not (*Dyer* v. *Park* (1874), 38 J. P. 294; *Bollard* v. *Spring* (1887), 51 J. P. 501).

(*i*) *R.* v. *Alsopp* (1691), 1 Show. 339; *Mayhew* v. *Wardley* (1863), 8 L. T. 504; and compare *Horn* v. *Raine* (1898), 67 L. J. (Q. B.) 533.

(*j*) Compare p. 226, *ante*.

(*k*) *Osbond* v. *Meadows* (1862), 26 J. P. 439. This is the case even if the attempt to gather the bird were made some hours after it had been shot, and it had in fact already been gathered by another (*Horn* v. *Raine*, *supra*), the shooting and the attempt to gather the bird being there held to be one continuous act. Where the attempt to gather is the result of a fresh intention or is made by some one other than the shooter or his agent, the offence committed would be larceny; compare *R.* v. *Townley* (1871), L. R. 1 C. C. R. 315; and see p. 213, *ante*. It is possible that if the game were shot by day and not gathered until night, no offence would be committed, for the offence under the Game Act, 1831 (1 & 2 Will. 4, c. 32), is trespassing by day, and in this case there would be no entry in the daytime, while as the game is dead there would be no offence under the Night Poaching Acts, 1828 and 1844 (9 Geo. 4, c. 69; 7 & 8 Vict. c. 29), and if there was always in the poacher's mind the intention to gather there could be no larceny (*R.* v. *Townley*, *supra*).

(*l*) *Kenyon* v. *Hart* (1865), 6 B. & S. 249; and this is so even if the bird were killed some days before (*Tanton* v. *Jervis* (1879), 43 J. P. 784).

(*m*) For in this case the bird is in no sense reduced into possession, and it therefore becomes the potential property of the person on whose land it alighted; see p. 226, *ante*.

(*a*) *Kenyon* v. *Hart*, *supra*, *per* BLACKBURN, J., at p. 255; compare *Sutton* v. *Moody* (1697), 1 Ld. Raym. 250.

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that is being beaten out of a boundary hedge by a person on his (the shooter's) own land commits an offence within the provision (*b*).

Right of free warren or chase.

But no offence is committed by persons hunting or coursing upon any lands with hounds or greyhounds in fresh pursuit of any deer, hare, or fox already started upon any other land by persons *bonâ fide* claiming and exercising any right or reputed right of free warren or free chase, or by any gamekeeper lawfully appointed to such free warren, or by any lord or steward of the Crown of any manor etc., or by any gamekeeper appointed by him within its limits (*c*). But a person who uses a highway, the soil of which is the property of another, to shoot at birds flushed on that other ground, commits an offence (*d*), and where one person from a highway assists another who is trespassing in pursuit of game both commit an offence (*e*).

Assisting trespasser.

Poaching in company.

480. Where five or more persons trespass in pursuit of game each of them is liable to a penalty not exceeding £5 and costs (*f*).

Poaching armed.

If any of the number be armed with a gun, and he or any of the others by violence, intimidation, or menaces prevents or endeavours to prevent the approach of any person authorised in that behalf for the purpose of requiring them to quit the land or declare their names and addresses, each member of the party and every person aiding or abetting them is liable upon conviction before two or more justices to a penalty not exceeding £5 and costs of the conviction in addition to any other penalty they may have incurred (*g*).

Defences.

481. Upon the hearing before the justices it is open to the person charged to prove by way of defence any matter which would have been a defence to an action for the trespass (*h*); but the onus of proof is on him (*i*).

Leave and licence.

482. The leave and licence of the occupier of the land is a valid defence when the occupier is the person having the right to the game (*k*); but the act must be strictly within the terms of the leave or licence (*l*).

(*b*) *Philpot* v. *Bugler* (1890), 54 J. P. 646.

(*c*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 35, but this does not apply in the case of royal forests, parks, chases or warrens (*ibid.*, s. 33).

(*d*) *R.* v. *Pratt* (1855), 4 E. & B. 860.

(*e*) *Stacey* v. *Whitehurst* (1865), 18 C. B. (N. S.) 344; and see *R.* v. *Passey* (1836), 7 C. & P. 282; and *R.* v. *Whittaker* (1848), 2 Car. & Kir. 636.

(*f*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30. Game within this provision includes woodcock, snipe, quail, landrail, and rabbits.

(*g*) *Ibid.*, s. 32. They may all be charged together or separately (*R.* v. *Littlechild* (1871), L. R. 6 Q. B. 293). A defendant may be charged with aiding or abetting only (*Stacey* v. *Whitehurst, supra*). As to who are authorised and the extent of their authority, see p. 228, *ante*.

(*h*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30.

(*i*) *Ibid.*, s. 42.

(*k*) *Ibid.*, s. 30. See *Pochin* v. *Smith* (1887), 52 J. P. 4. A leave or licence given after the fact would not condone the offence (*Morden* v. *Porter* (1860), 7 C. B. (N. S.), 641 *per* WILLIAMS, J., at p. 647).

(*l*) Therefore, if a man obtains leave or licence from the wife of the occupier to hunt rabbits and proceeds to course a hare, he is not within this provision

When, however, the right to the game has been reserved, the holder of that right is the legal occupier for the purpose of granting leave or licence to enter in search or pursuit of game etc., and the leave or licence of the actual occupier is of no avail (*m*). In the case of wastes or commons within a manor etc., the lord or steward of the Crown of the manor etc. is the legal occupier for this purpose (*n*).

Leave of occupier where right to game reserved.

483. Upon the hearing before the justices it is also open to the defendant to set up a claim of right. This, if valid, will oust the jurisdiction of the justices (*o*). It is essential that the right should be a right relating to the land (*p*), and the claim a *bonâ fide* claim (*q*) having some ground not wholly unreasonable for its assertion (*r*). If the claim is a *bonâ fide* claim it is not for the justices to inquire into all the circumstances to see if it is impossible. When it is not on the face of it impossible the jurisdiction of the justices is at an end (*s*). But the jurisdiction of the justices is not ousted by a *bonâ fide* claim of a right which cannot exist in law, nor by a *bonâ fide* but mistaken belief on the part of the defendant that he has a right to kill the game (*t*).

Claim of right.

(*Taylor* v. *Jackson* (1898), 78 L. T. 555). *Quære*, whether in any case the wife's leave is a valid defence (*ibid.*).

(*m*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30; *Pryce* v. *Davies* (1871), 35 J. P. 374; *Morden* v. *Porter* (1860), 7 C. B. (N. S.) 641. If the person to whom leave is granted by the actual occupier kills, takes, or is in pursuit of game (but not woodcock, snipe, quail, landrail, or rabbits), the actual occupier himself is liable to a penalty for the pursuit and for every head of game killed or taken (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 12); see p. 218, *ante*. When, as for instance, on a parol lease of land, there is a dispute as to whether the right to game is reserved, it seems that the question is one of fact for the magistrates to decide (*R.* v. *Critchlow* (1878), 26 W. R. 681). Where a person has taken under an unsealed agreement the right to shoot, he cannot give a valid leave to another to do so, as he has no legal right himself (*Brigstocke* v. *Rayner* (1875), 40 J. P. 245). As to licences to enter upon land, generally, see title REAL PROPERTY AND CHATTELS REAL.

(*n*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30.

(*o*) *R.* v. *Cridland* (1857), 7 E. & B. 853; compare *Cole* v. *Miles* (1888), 57 L. J. (M. C.) 132.

(*p*) The defendant, in order to succeed, must set up a title to the land in himself or in some other through whose licence or authority he was acting (*Leatt* v. *Vine* (1861), 30 L. J. (M. C.) 207; *Cornwell* v. *Sanders* (1862), 3 B. & S. 206). Where a boundary hedge was being beaten and the defendant was standing on land to which he had no title, he could not set up a claim of right (*Philpot* v. *Bugler* (1890), 54 J. P. 646). When in the course of the hearing of a summons for assault the defendants (gamekeepers) claimed the right to take from the prosecutor a bag, the property of the prosecutor, on the ground that it contained rabbits belonging to the landlord, this was not such a claim of right as would oust the jurisdiction of the justices, as it did not relate to an interest in land (*White* v. *Fox* (1880), 49 L. J. (M. C.) 60).

(*q*) *White* v. *Feast* (1872), L. R. 7 Q. B. 353; *Lovesy* v. *Stallard* (1874), 30 L. T. 792; *Penwarden* v. *Palmer* (1894), 18 T. L. R. 362; *Mann* v. *Nurse* (1901), 17 T. L. R. 569.

(*r*) The absence of *mens rea* is not of itself a complete defence (*Watkins* v. *Major* (1875), L. R. 10 C. P. 662; *Birnie* v. *Marshall* (1876), 41 J. P. 22; and see *Morden* v. *Porter*, *supra*; *Mussett* v. *Burch* (1876), 35 L. T. 486; *Newcombe* v. *Fewins* (1876), 41 J. P. 581).

(*s*) *Scott* v. *Baring* (1895), 64 L. J. (M. C.) 200, *per* KENNEDY, J., at p. 202; compare *Watkins* v. *Smith* (1878), 38 L. T. 525.

(*t*) *Hudson* v. *MacRae* (1863), 4 B. & S. 585; *Leatt* v. *Vine*, *supra*; and generally as to ouster of jurisdiction by a claim of right, see title MAGISTRATES.

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Regulation of proceedings.

484. The proceedings both before and at the hearing before the justices are regulated by the Summary Jurisdiction Acts (*a*); but proceedings must be commenced within three months of the commission of the offence (*b*).

Persons to lay information against trespasser.

485. Information may be laid by anyone whether he is interested in the land trespassed on or not (*c*). Though usually made in writing it need not be so (*d*), nor need it be on oath unless a warrant is to be issued (*e*). In the first instance a summons is to be issued, unless it is unlikely to be effectual (*f*). If a summons is ineffectual in obtaining the presence of the defendant at the hearing a warrant will then be issued (*g*).

Procedure.

One information is sufficient, where more than one offender is a party to the same offence (*h*), and the justices have a discretion as to whether the offenders shall be tried together or not (*i*); but in any case there should be a separate conviction of each of them (*k*).

The information must charge one offence only (*l*), and the conviction, if any, must be for that offence (*m*).

Irregularity in information on summons.

486. An irregularity in the information or summons is cured by the appearance of the defendant in answer to the charge (*n*). Where more than one defendant is charged with the same offence, each of them is liable to the full penalty if convicted (*o*). A defendant who is convicted has a right of appeal to the next general or quarter sessions of the peace (*p*); or he may require the justices to state a case for the opinion of the High Court upon a point of law (*q*). But no conviction or adjudication upon appeal

(*a*) Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), 1879 (42 & 43 Vict. c. 49), and 1884 (47 & 48 Vict. c. 43); *Ryland* v. *Wynn* (1900), 64 J. P. 522; see title MAGISTRATES.

(*b*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 41. The three months are calendar months, and are to be calculated so as to exclude the day on which the offence was committed, but to include that on which the information is laid (*Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161). The exact date need not be specified so long as it is stated to be within the required limit of three months; compare *Onley* v. *Gee* (1861), 7 Jur. (N. S.) 570.

(*c*) *Midelton* v. *Gale* (1838), 8 Ad & El. 155; *Morden* v. *Porter* (1860), 7 C. B. (N. S.) 641.

(*d*) *R.* v. *Hughes* (1879), 4 Q. B. D. 614, C. C. R.; and see title MAGISTRATES.

(*e*) Compare Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 10, 11.

(*f*) *O'Brien* v. *Brabner* (1885), 49 J. P. 227.

(*g*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 1, 2.

(*h*) *R.* v. *Cridland* (1857), 7 E. & B. 853; *R.* v. *Littlechild* (1871), L. R. 6 Q. B. 293; *R.* v. *Staffordshire Justices* (1858), 32 L. T. (O. S.) 105; and this is the case whether all are principals or some principals and some aiders or abettors.

(*i*) *R.* v. *Littlechild*, *supra*.

(*k*) *Ibid.*

(*l*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10; and see *R.* v. *Cridland*, *supra*.

(*m*) Compare *Martin* v. *Pridgeon* (1859), 1 E. & E. 778; *R.* v. *Brickhall* (1864), 10 Jur. (N. S.) 677; and see title MAGISTRATES.

(*n*) *R.* v. *Hughes*, *supra*. When the defendant has once appeared it may be possible to prefer another charge against him (*ibid.*).

(*o*) *R.* v. *Littlechild*, *supra*.

(*p*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 44.

(*q*) Summary Jurisdiction Acts, 1857 (20 & 21 Vict. c. 43), s. 2, and 1879 (42 & 43 Vict. c. 49), s. 33; and see title MAGISTRATES.

may be quashed for want of form or removed to the High Court by *certiorari* or otherwise (*r*).

Appropriation of fines.

The money received in fines is to be paid to the overseer or other officer of the parish, township, or place where the offence was committed, as the justices may direct, and is to be paid by him to the account of the general county rate (*s*).

SUB-SECT. 2.—*Poaching by Night.*

Poaching by night.

487. It is an offence to take or destroy any game or rabbits unlawfully by night upon any land, whether open or inclosed, or upon any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into a public road, highway, or path (*t*).

It is also an offence unlawfully to enter or be upon any land, whether open or inclosed, by night with a gun, net, engine, or other instrument for the purpose of taking or destroying game (*a*).

Penalty.

An offender is liable upon a first conviction for either of these offences before two or more justices of the peace to imprisonment for three months with hard labour, and at the end of the period may be required to find recognisances for his not so offending again for a year, with the alternative of remaining in prison with hard labour for a further six months, unless and until the required sureties are found (*b*).

Second offence.

Upon a second conviction before two or more justices for one of the above offences he is liable to imprisonment with hard labour for six months, and at the end of the period may be required to find recognisances for his not so offending again for two years, with

(*r*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 45.

(*s*) *Ibid.*, s. 37.

(*t*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1; Night Poaching Act, 1844 (7 & 8 Vict. c. 29), s. 1. It is unlawful for any person, whether otherwise entitled to the game or not, to use firearms for killing game by night (Hares Act, 1848 (11 & 12 Vict. c. 29), s. 5; see p. 210, *ante*). "Night" begins at the expiration of the first hour after sunset and ends at the beginning of the last hour before sunrise (Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 12). To "take" means to catch, not, as in larceny, to take away (*R.* v. *Glover* (1814), Russ. & Ry. 269, C. C. R.; *Bevan* v. *Hopkinson* (1876), 40 J. P. 117). Sunset is not the hour of sunset by Greenwich time, but the actual hour at which the sun sets in the particular place (*Curtis* v. *March* (1858), 3 H. & N. 866; compare *Gordon* v. *Cam* (1899), 68 L. J. (Q. B.) 434). See, further, as to meaning of terms "night" and "sunset," title TIME. "Game" means live game the property in which is not absolute. It is not an offence under this Act to enter for the purpose of taking young pheasants from a coop (*R.* v. *Garnham* (1861), 8 Cox, C. C. 451).

(*a*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1. Rabbits are not here included. Waste land at the side of a highway is not "open land" in the sense intended (*Vesey* v. *Hoskins, Harris* v. *Hoskins* (1865), 34 L. J. (M. C.) 145). In order to prove that a person is unlawfully on land at night it is not necessary to prove that he had not leave or licence to be there (*R.* v. *Wood* (1856), 7 Cox, C. C. 106, C. C. R.). As to the right of the police in any highway, street, or public place to search persons coming from land where they may suspect them to have been unlawfully in search or pursuit of game, see p. 236, *post*.

(*b*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1. Where an offender is convicted of entering or being upon land etc. the conviction must state that he was there for the purpose of taking or destroying game on the land (*Fletcher* v. *Calthorp* (1845), 14 L. J. (M. C.) 49). In the form of the recognisance the word "so" to offend is essential to its validity (*Re Reynolds and Hodgson* (1844), 8 J. P. 199).

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the alternative of remaining in prison with hard labour for a further period of a year, unless and until the required sureties are found (*c*).

Third offence.

In the event of a third offence he is guilty of a misdemeanour, and upon conviction is liable to a sentence of penal servitude for seven years or to imprisonment for two years with hard labour (*d*). The offender may be tried at assizes or at quarter sessions. Convictions by justices for a first or second offence are to be returned to quarter sessions, when they are to be registered by the clerk of the peace, and may be given in evidence on a trial for a second or third offence (*e*).

Assault by poacher.

488. An offender who assaults or offers any violence with an offensive weapon towards any person authorised to arrest him is liable, even if it is his first or second offence, to be dealt with in the same way as if he were offending for the third time (*f*). If three or more persons at night unlawfully enter or are upon any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, and any of them is armed with a gun, cross-bow, firearms, bludgeon, or any other offensive weapon, each of them is liable upon

Penalty.

conviction to a sentence of penal servitude of from three to fourteen years, or to imprisonment for two years with hard labour (*g*).

(*c*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1; and see *R.* v. *Lines*, [1902] 1 K. B. 199, C. C. R. The fact that he became liable to six months' imprisonment does not entitle him to claim to be tried by a jury under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17, as the original offence was not one punishable by more than three months' imprisonment (*Williams* v. *Wynne* (1888), 52 J. P. 68).

(*d*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1. But an indictment charging a third offence under s. 1 (*ibid.*), which shows upon the face of it that one of the previous convictions was an offence against s. 9 (*ibid.*) (see note (*g*), *infra*), is bad (*R.* v. *Lines*, *supra*); and a conviction under s. 2 of the Night Poaching Act, 1828 (9 Geo. 4, c. 69), cannot be treated as a previous conviction under *ibid.*, s. 1 (*R.* v. *McLauchlan* (1910), 75 J. P. 8, a case decided at quarter sessions). The previous convictions must be set out in the indictment and proved (*R.* v. *Merry* (1847), 2 Cox, C. C. 240; *Cureton* v. *R.* (1861), 1 B. & S. 208); but in *R.* v. *Woodfield* (1887), 16 Cox, C. C. 314, evidence of previous convictions was disallowed by HAWKINS, J., until the jury had found the prisoner guilty.

(*e*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 8.

(*f*) *Ibid.*, s. 2; and see note (*d*), *supra*. As to what are offensive weapons, see note (*g*), *infra*. As to persons authorised to arrest, see p. 236, *post*. As to seizure of game, see p. 238, *post*. But if the trespasser assaults a person at a time or in a place (*e.g.*, a highway) when or where such person is not attempting to arrest him, he is not guilty of an assault within this section (*R.* v. *Doddridge* (1860), 8 Cox, C. C. 335).

(*g*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 9. It is not essential that all the defendants should actually enter the land. If all are associated for a common purpose and some enter, while others remain near enough to assist, all of them may be convicted (*R.* v. *Whittaker* (1848), 2 Car. & Kir. 636, C. C. R.). Those who watch outside and enter to give the alarm are equally guilty with those who first entered (*R.* v. *Passey* (1836), 7 C. & P. 282; *R.* v. *Scotton* (1844), 5 Q. B. 493). If some are found on the land specified and others assist from adjoining land, all may be alleged to be on the land specified (*R.* v. *Andrews* (1837), 2 Mood. & R. 37). Nor is it necessary that all should be on land in the same ownership (*R.* v. *Uezzell* (1851), 3 Car. & Kir. 150, C. C. R.), but they must have a plan in common (*R.* v. *Nickless* (1839), 8 C. & P. 757); and if one is in a wood separated by a high road from the land where the others are, there may not be sufficient evidence of a common plan (*R.* v. *Dowsell* (1834), 6 C. & P. 398). If one of the party is "armed" all are deemed to be so (*R.* v. *Goodfellow* (1845), 1 Car. & Kir. 724, C. C. R.; *R.* v. *Smith* (1818), Russ. & Ry. 368, C. C. R; and see *R.* v. *Andrews*, *supra*; *R.* v. *Southern* (1821), Russ. & Ry. 444, C. C. R.). Where a

The trial must be at assizes (*h*). Where the night trespasser commits an indictable offence (*i*), any person is entitled to arrest him and hand him over to the police (*k*).

Summary proceedings.

489. The prosecution for an offence triable by a court of summary jurisdiction must be commenced within six months of the date of the offence (*l*), and for an offence punishable upon indictment within twelve months of the date of the offence (*m*).

Where the offence is tried by a court of summary jurisdiction the rules governing procedure are the same as in the case of offences against the Game Act, 1831 (*n*), as also are the conditions as to appeal (*o*), and *certiorari* (*p*).

SUB-SECT. 3.—*The Poaching Prevention Act*, 1862.

Acts for prevention of poaching.

490. The Poaching Prevention Act, 1862 (*q*), was designed not for the creation of new offences, but for the more effective prevention of offences already recognised by the law.

The Game Act, 1831 (*a*), and the Night Poaching Acts, 1828 and 1844 (*b*), made certain acts offences, and conferred upon owners and

keeper, attempting to arrest several offenders, is killed by one of them, all may be convicted of murder, unless any of them can prove that he separated from the others and was not responsible for the act (*R.* v. *Edmeads* (1828), 3 C. & P. 390; see also *R.* v. *Warner* (1833), 1 Mood. C. C. 380). Persons who have been on land at night armed may be convicted under this provision, even though they have abandoned their arms before being arrested (*R.* v. *Nash* (1819), Russ. & Ry. 386). Large stones have been held to be offensive weapons (*R.* v. *Grice* (1837), 7 C. & P. 803). A stick is not necessarily an offensive weapon; whether it is so depends on the object with which it is taken out (*R.* v. *Fry* (1837), 2 Mood. & R. 42); compare *R.* v. *Palmer* (1831), 1 Mood. & R. 70; *R.* v. *Williams* (1878), 14 Cox, C. C. 59. This may perhaps be the case even if it is in fact used offensively (*R.* v. *Merry* (1847), 2 Cox, C. C. 240; but see *R.* v. *Sutton* (1877), 13 Cox, C. C. 648).

(*h*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 9.

(*i*) See note (*k*), p. 245, *post*.

(*k*) Prevention of Offences Act, 1851 (14 & 15 Vict. c. 19), s. 11. Night is defined in s. 13 (*ibid.*) somewhat differently from the definition in the Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 13, see note (*t*), p. 233, *ante*. This does not interfere with the right given to anyone to make an arrest if the offence is committed at an hour which is "night" under both provisions (*R.* v. *Sanderson* (1859), 1 F. & F. 598); but if the offence were committed at a time which is not night under the Act creating the offence such an arrest would appear to be unlawful (*R.* v. *Tomlinson* (1835), 7 C. & P. 183).

(*l*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11.

(*m*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 4. The issue of a warrant is not a beginning of proceedings (*R.* v. *Hull* (1860), 2 F. & F. 16; *R.* v. *Parker* (1864), 9 Cox, C. C. 475, C. C. R.); but the proceedings are begun if the prisoner is committed for trial (*R.* v. *Austin* (1845), 1 Car. & Kir. 621; *R.* v. *Brooks* (1847), 2 Car. & Kir. 402, C. C. R.), or, it appears, if the information is laid, the warrant issued, and the prisoner actually arrested within the time (*R.* v. *Brooks, supra*). A prisoner who pleaded guilty, but on whose behalf an application was made in arrest of judgment on the ground that the proceedings were not begun in time, was allowed to withdraw his plea (*R.* v. *Casbolt* (1869), 11 Cox, C. C. 385).

(*n*) 1 & 2 Will. 4, c. 32; see p. 232, *ante*; and see, generally, title MAGISTRATES.

(*o*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 6.

(*p*) *Ibid.*, s. 7; see pp. 232, 233, *ante*.

(*q*) 25 & 26 Vict. c. 114.

(*a*) 1 & 2 Will 4, c. 32; see p. 209, *ante*. As to gamekeepers, see pp. 240 *et seq.*, *post*.

(*b*) 9 Geo. 4, c. 69; 7 & 8 Vict. c. 29; see p. 233, *ante*.

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occupiers and their gamekeepers and other servants powers for the prevention and prosecution of such offences. The private defence of private rights of property was thus recognised and sanctioned.

Police.

The police have no part assigned to them under these statutes, and any part they may take is only such as any bystander called upon to render assistance might assume.

Private persons.

The authority of private persons is, however, necessarily limited to the land over which they have rights either as owners or occupiers. To make this authority effective it is necessary that offenders should not be able to escape arrest by quitting the land where they have committed an offence; and this requirement is only partly met by the power of pursuit given to the servants of the owner or occupier in the case of night poachers (*c*); for this power can only be exercised in the case of offenders caught *flagrante delicto*.

Poaching Prevention Act.

491. It is the object of the Poaching Prevention Act to supplement the powers exercisable on behalf of private owners by giving the police (*d*) the right of searching persons found upon any highway, street, or public place (*e*) whom they may suspect of coming from land on which they have been unlawfully in pursuit of game or of having in their possession any gun (*f*) or net (*g*) used for the purpose of killing or taking game. The effect of this provision is that there are two offences (*h*) with which a suspected person may be charged—(1) having obtained game by having been unlawfully on land (*i*) in pursuit of game; (2) having used a gun or net etc. for unlawfully taking game (*k*).

"Game" under Poaching Prevention Act.

"Game" for the purpose of this Act includes hares, pheasants, partridges, woodcock, snipe, rabbits, grouse, and black or moor game, and the eggs of pheasants, partridges, grouse, and black or moor game (*l*).

Proof of offences.

492. The proof of either of these offences is necessarily in most cases a matter of inference from circumstantial evidence, but the

(*c*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 2.

(*d*) That is, such police as have authority to act in the particular place. As to what police officers other than those of the county or borough where the particular place is situated have this authority, see title POLICE.

(*e*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2. A public place would seem for this purpose to be any place in which the police would be in the ordinary execution of their duty (*Clarke* v. *Crowder* (1869), L. R. 4 C. P. 638, *per* BOVILL, C.J., at p. 641).

(*f*) Or "part of gun" (Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2).

(*g*) Or "engine" (*ibid.*). Compare the phrase "gun, net or other engine or instrument" in the Game Act, 1831 (1 & 2 Will. 4, c. 32), and in the Night Poaching Acts, 1828 (9 Geo. 4, c. 69) and 1844 (7 & 8 Vict. c. 29) (see pp. 209, 233, *ante*), and the phrase "gun, net or other engine" in the Game Licences Act, 1860 (23 & 24 Vict. c. 90) (see p. 246, *post*). The phrase would appear to include a "snare" (see *Allen* v. *Thompson* (1870), L. R. 5 Q. B. 336).

(*h*) *Evans* v. *Botterill* (1863), 3 B. & S. 787, *per* COCKBURN, C.J., at p. 790.

(*i*) The land need not be any particular land (*ibid.*); and see *Brown* v. *Turner* (1863), 13 C. B. (N. S.) 485; *Fuller* v. *Newland* (1863), 27 J. P. 406.

(*k*) It is immaterial whether the net etc. has been used successfully or not; it is sufficient if there is evidence of its having been used with the intent of unlawfully taking game (*Jenkin* v. *King* (1872), L. R. 7 Q. B. 478).

(*l*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 1.

court of summary jurisdiction before whom the charge is heard has as much right to draw such inference as any other tribunal (*m*); and its decision is unlikely to be impugned except in a case where if the evidence had been laid before a jury it could have been said that there was no evidence on which to convict (*n*).

In order to establish the commission of an offence (*o*) under this Act the following facts must be proved:—

Necessary facts.

(1) The offender must be found in a highway, street, or public place (*p*).

(2) The constable must have good cause to suspect that the offender was coming from land where he had been unlawfully in search or pursuit of game (*q*).

(3) The offender must have in his possession some game unlawfully obtained, or a gun, net, or other engine (*r*).

(4) The game or gun, net, or other engine must be found on the offender, if not by actual search then by observation (*s*).

Accessory to offence.

It is also an offence to be accessory to the above offences (*t*), and it is within the powers of a constable in any highway, street, or public place to stop and search any cart or other conveyance in or upon which he has good cause to suspect that any game which has been unlawfully obtained or any gun, net etc. is being carried (*a*).

(*m*) *Brown* v. *Turner* (1863), 13 C. B. (N. S.) 485, *per* ERLE, C.J., at p. 493; *Cornwell* v. *Sanders* (1862), 3 B. & S. 206.

(*n*) *Brown* v. *Turner*, *supra*, *per* WILLIAMS, J., at p. 495; and see *Evans* v. *Botterill* (1863), 3 B. & S. 787; *Fuller* v. *Newland* (1863), 27 J. P. 406.

(*o*) *Clarke* v. *Crowder* (1869), L. R. 4 C. P. 638.

(*p*) See p. 236, *ante*.

(*q*) In the absence of good cause of suspicion the constable has no right to search the alleged offender, and in such case the latter has a right to resist being searched. On an indictment for an assault upon a constable it was held that the prosecution must prove that the constable had reasonable ground for suspicion (*R.* v. *Spencer* (1863), 3 F. & F. 857).

(*r*) *Clarke* v. *Crowder*, *supra*. It is insufficient if suspected persons are followed into a house and there are found in the house game or guns, nets etc. (*ibid.*).

(*s*) Although the offender must be found by the constable upon a highway etc., the actual search need not take place there. It was at one time suggested that this must be so (*Turner* v. *Morgan* (1875), L. R. 10 C. P. 587); but it is evident that if such were the law an offender would only have to throw his game or gun etc. over a hedge before he was stopped in order to evade arrest; see *Lloyd* v. *Lloyd* (1885), 14 Q. B. D. 725. Actual search is not necessary where the presence of the incriminating thing is evident. Thus, where a constable saw a poacher with a gun on a public footpath pick up a rabbit which was thrown to him by another and there was no search made, the evidence of what was actually seen by the constable was held sufficient (*Hall* v. *Knox* (1863), 4 B. & S. 515; *Ex parte Hurst* (1863), 27 J. P. 824). Again, where an offender found upon a highway took to flight across some fields and dropped a bag containing rabbits which the constable had seen in his possession, this was also held sufficient (*Lloyd* v. *Lloyd*, *supra*).

(*t*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2.

(*a*) *Ibid.*; *Stowe* v. *Marjoram* (1909), 101 L. T. 569. In the case of a carrier who has not been seen to be upon land other than the highway or to have received game etc. from others, it is not easy to prove an offence. Thus, where a carrier was stopped and his cart searched and game was found in the cart which had been recently killed, and the carrier's boots were wet although the road was dry, yet it was held that while the game had probably been obtained unlawfully by him either by poaching himself or receiving it from a poacher, there was no sufficient proof of his having been on land unlawfully himself or

SECT. 2. Criminal.

Procedure.

493. On stopping and searching a suspected offender it is the duty of a constable to seize and detain any game or gun, net, or other engine that may be found in his possession (*b*). He cannot arrest the suspected person himself, but must apply to a justice of the peace for a summons against him (*c*); and the summons must be for an offence against the Poaching Prevention Act, 1862 (*d*), and no other (*e*). The alleged offender is to be tried before two justices of the peace, and upon conviction before them is liable to a penalty not exceeding £5 and to forfeit the game or gun, net and engine, found in his possession (*f*).

Penalties.

The penalties are to be recovered as in the case of offences under the Game Act (*g*); no conviction or order or adjudication on appeal therefrom may be quashed for want of form, and there is no power to remove the case to the High Court by *certiorari* (*h*). The defendant may appeal from the conviction to quarter sessions (*i*).

Sale of confiscated game, guns etc.

Where game, guns, nets and engines are confiscated the justices may direct them to be sold or destroyed (*j*).

The proceeds of the sale, together with the amount of the penalty, are to be paid to the treasurer of the county or borough where the conviction takes place (*k*). If the alleged offender is not convicted, the game or other articles seized, or the value thereof, are to be returned to him (*l*).

of having obtained it from others who had (*Jones* v. *Dicker* (1870), 22 L. T. 95; *Lawley* v. *Merricks* (1887), 51 J. P. 502); but see *Stowe* v. *Marjoram* (1909), 101 L. T. 569, and compare *Shuttleworth* v. *Grange* (1867), 31 J. P. 280, from which it would appear that had the hour (3 a.m.) when the carrier was found on the road not been his customary time, he would have been convicted (*ibid., per* WILLES, J., at p. 281); compare *Ex parte Whiteley* (1875), 39 J. P. 70; *R.* v. *Cheshire Justices* (1876), 40 J. P. 148. Under a former statute it was held unnecessary in a case where a carrier had game unlawfully in his possession to state in the information that he knew it was in his cart (*R.* v. *Marsh* (1824), 2 B. & C. 717); but under this statute it is necessary that the information should charge the defendant either with having come from land where he had been unlawfully in pursuit of game or with being accessory to other persons so offending (*Lundy* v. *Botham* (1877), 41 J. P. 774).

(*b*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2.

(*c*) *Ibid.* The time within which this must be done is six months (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11).

(*d*) 25 & 26 Vict. c. 114.

(*e*) Thus, having stopped a carrier and found in his cart a hamper of partridge eggs, he cannot summon the carrier or any person alleged to have incited him to steal the eggs for unlawfully taking the eggs from land without the owner's permission (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 24; *Stowe* v. *Benstead*, [1909] 2 K. B. 415).

(*f*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2.

(*g*) *Ibid.*, s. 3; see p. 232, *ante*.

(*h*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 5.

(*i*) *Ibid.*, s. 6.

(*j*) *Ibid.*, s. 2. If the game is sold the vendor is protected from the consequences of selling without a licence (*ibid.*; and see note (*m*), p. 256, and note (*u*), p. 261, *post*).

(*k*) Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2.

(*l*) *Ibid.* It has been held that where goods are seized and the defendant convicted but the conviction is subsequently quashed, the value of the goods to be returned is their value at the time the conviction is quashed (*Stowe* v. *Benstead, supra*). Where a seizure of eggs which might properly have been made under the powers given by this Act is wrongly made with a view to a prosecution under the Game Act, an action for detinue or trover is maintainable against the person who made the seizure (*ibid.*).

Offences under Larceny Act, 1861.

494. When the property in game or the eggs of game has become absolute the game or eggs become, like other property, the subject of larceny at common law (*m*).

This applies to game when killed or otherwise reduced into possession (*n*); also to eggs that have been collected from the nest (*o*) and to young birds that are unable to fly (*p*).

Stealing game.

495. Game that is kept in captivity is further protected by statute. It is an offence to steal or to kill with the intent of stealing any such bird or beast, and the offender is liable upon conviction before a court of summary jurisdiction to imprisonment with or without hard labour for six months or to a fine not exceeding £20 in addition to the value of the animal killed (*q*). The punishment for a second offence may be imprisonment for twelve months with hard labour (*r*).

Unlawful possession.

496. Any person found in possession of such bird or beast or the plumage or skin thereof knowing it to be stolen is to forfeit it on conviction by a court of summary jurisdiction, and in the case of a second offence is liable to the same penalty as if he had himself committed the larceny (*s*). The stolen property may be restored to the owner by any justice (*t*).

Hares and rabbits.

497. It is an offence unlawfully and wilfully to kill or take hares and rabbits in a warren or on ground which is lawfully used as a place for keeping or breeding those animals, whether it is inclosed or not (*a*). If committed by night the offence is a misdemeanour (*b*); if by day, the offender is liable upon conviction before a court of summary jurisdiction to a fine not exceeding £5 (*c*). It is an offence, punishable as in the last-mentioned offence, to set or use a snare or engine for taking hares or rabbits in such a place at any time (*d*).

(*m*) See p. 212, *ante*.

(*n*) *R.* v. *Townley* (1871), L. R. 1 C. C. R. 315; see p. 212, *ante*; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 641. Compare note (*t*), p. 233, *ante*.

(*o*) *R.* v. *Stride and Millard*, [1908] 1 K. B. 61, C. C. R.

(*p*) *R.* v. *Shickle* (1868), L. R. 1 C. C. R. 158.

(*q*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 21.

(*r*) *Ibid.*

(*s*) *Ibid.*, s. 22.

(*t*) *Ibid.*

(*a*) *Ibid.*, s. 17. To "take" means not to take away, but to catch. A person found laying hands on a live rabbit caught in a snare is an offender against this provision (*R.* v. *Glover* (1814), Russ. & Ry. 269, C. C. R.). Whether or not a place comes within the term "warren or ground" etc. is a question of fact to be decided by the justices (*Bevan* v. *Hopkinson* (1876), 40 J. P. 117); see also *R.* v. *McLauchlan* (1910), 75 J. P. 8. When the justices find that it is not, they may convict the offender under the Night Poaching Act, 1828 (9 Geo. 4, c. 69), if the offence was committed by night (*ibid.*), or presumably under the Game Act, 1831 (1 & 2 Will. 4, c. 32), if it was committed by day. A rickyard, where a few rabbits happen to be kept, is not within the term (*R.* v. *Garratt* (1834), 6 C. & P. 369).

(*b*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 17. The definition of "night" is the same as that in the Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 12, see note (*t*), p. 233, *ante*, namely, from the time between the expiration of the first hour after sunset and the beginning of the last hour before sunrise; see also title TIME.

(*c*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 17. The definition of "day" is the complement of the above definition of night, and is the same as that in the Game Act; see note (*e*), p. 228, *ante*.

(*d*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 17.

Part VI.—Gamekeepers.

SECT. 1. Appointment.

SECT. 1.—*Appointment.*

Appointment.

498. By ordinary employers gamekeepers are engaged in the same manner and on the same terms as to notice and the like as any other servants (*e*).

In manors.

499. In a manor, lordship, or royalty (*f*) the lord (*g*) thereof may by writing under his hand and seal (*h*) appoint one or more persons to act as gamekeeper (*i*) to preserve or kill the game within its limits for his (the lord's) use (*k*), with authority to seize for his use dogs, nets, and other engines and instruments, used by unlicensed persons (*l*) within its limits for killing or taking game.

Moreover, the lord may depute any person, who may or may not be the gamekeeper or be retained and paid for as the male servant of any other person, to be a gamekeeper for the manor, lordship, or royalty or for such division or district thereof as he may think fit, and may authorise him to kill game for the use of himself (the gamekeeper) or of any other person specified in the appointment or deputation and to exercise all the powers of a gamekeeper of a manor (*m*). A gamekeeper so authorised to kill game for the

(*e*) If the gamekeeper occupies a cottage as such he may be required to leave the cottage at the time he leaves his employer's service without further notice (*Bertie* v. *Beaumont* (1812), 16 East, 33; *White* v. *Bailey* (1861), 10 C. B. (N. S.) 227). As to the general relations of master and servant, see title MASTER AND SERVANT.

(*f*) Or reputed manor, lordship, or royalty (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 13), but not a wapentake or hundred, the lord of which cannot "appoint" (*Aylesbury* (*Earl*) v. *Pattison* (1778), 1 Doug. (K. B.) 28). A reputed manor etc. is one in which for want of freeholders or copyholders the court has ceased to be held. As to what is necessary to prove its existence as a manor, see *Rushworth* v. *Craven* (1825), M'Cle. & Yo. 417; *Steel* v. *Prickett* (1819), 2 Stark. 463; *Doe* d. *Beck* v. *Heakin* (1835), 6 Ad. & El. 495; *Carnarvon* (*Earl*) v. *Villebois* (1844), 13 M. & W. 313; *Doe* d. *Molesworth* v. *Sleeman* (1846), 9 Q. B. 298; and see, generally, title COPYHOLDS, Vol. VIII., p. 4.

(*g*) Or, in the case of a manor, lordship, or royalty belonging to the Crown, the steward thereof (Game Act, 1831 (1 & 2 Will. c. 32), s. 13). The right of appointment is inseparable from the lordship of the manor, so that it cannot be granted to another (*Calcraft* v. *Gibbs* (1792), 5 Term Rep. 19). Where the manor is part of a trust estate the trustee may appoint a gamekeeper for the purpose of preserving the game in the interest of the estate, but not in his own interest (*Webb* v. *Shaftesbury* (*Earl*), *Shaftesbury* (*Earl*) v. *Arrowsmith* (1802), 7 Ves. 480, 488).

(*h*) In the case of a body corporate, then under the seal of that body (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 13).

(*i*) If the gamekeeper's right is challenged it is sufficient for him to prove that the lord has a colourable title to the manor (*Hunt* v. *Andrews* (1820), 3 B. & Ald. 341), but in the absence or disproof of even a colourable title mere good faith on the part of the gamekeeper is insufficient to protect him (*Calcraft* v. *Gibbs*, *supra*).

(*k*) Unless the contrary is proved it will be assumed that the game killed by the gamekeeper is for the use of the lord (*Spurrier* v. *Vale* (1809), 10 East, 413).

(*l*) See p. 245, *post*.

(*m*) Game Act, 1831 (1 & 2 Will. 3, c. 32), s. 14. For a form of appointment, see Encyclopædia of Forms and Precedents, Vol. I., p. 392.

use of any person other than the lord is not to be entered or paid for as the gamekeeper or male servant of the lord (*n*).

Wales.

500. In Wales an owner of land worth £500 a year which is not within the bounds of any manor, lordship, or royalty, or which, if within such bounds, has been enfranchised or alienated therefrom, is entitled to appoint one or more persons as gamekeepers to pursue and kill game on his lands (*o*). He may also with the permission in writing of any other owner of similar lands in Wales extend the authority of his gamekeeper to pursue or kill the game on those lands also (*p*).

Registration.

501. Appointments and deputations of gamekeepers are not valid until registered with the clerk of the peace of the place wherein the manors, lordships, or royalties to which they relate are situated (*q*). A 10*s.* stamp is required for each appointment or deputation (*r*).

After registration the appointment or deputation continues in force until the date named therein for its expiration or until revocation by dismissal or otherwise (*s*).

SECT. 2.—*Licences required.*

Gamekeepers' licences.

502. A gamekeeper, whether in a privileged place, such as a manor, or elsewhere, is the male servant of some employer, and as such the employer must obtain a licence for him (*t*).

Game licence.

503. A gamekeeper who is required to kill game must either take out a game licence himself or his employer must take out one for him (*a*).

In manors or royalties the lord who grants the gamekeeper his appointment or deputation may take out a licence for him (*b*).

(*n*) Game Act, 1831 (1 & 2 Will. 3, c. 32), s. 14.

(*o*) *Ibid.*, s. 15.

(*p*) *Ibid.*

(*q*) *Ibid.*, s. 16; see *Rushworth* v. *Craven* (1825), M'Cle. & Yo. 417; *Bush* v. *Green* (1837), 4 Bing. (N. C.) 41.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. "There seems no reason why the deputation or appointment of one gamekeeper by one lord to several manors should require more than one document or one stamp, but if more than one gamekeeper is appointed by the same document a separate stamp would be required for each" (Warry's Game Laws of England, 1st ed., 1896, p. 150).

(*s*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 16. "Otherwise" includes the death of the grantor, after which a new appointment or deputation must be made by his successor. Where, however, a gamekeeper, after the death of the person appointing him, continued to be employed by that person's successors, employment of a watcher by him was considered sufficient authority to the watcher to arrest night poachers (*R.* v. *Fielding* (1848), 2 Car. & Kir. 621).

(*t*) Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 18; see title REVENUE. The licence is an annual licence expiring on 31st December in each year, and the duty payable on it is 15*s.* (*ibid.*).

(*a*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 2. The term "game" includes woodcock, snipe, quail, landrail, rabbits, and deer; see p. 208, *ante*. Without a game licence he may assist his employer in killing game if his employer has a game licence (*ibid.*, s. 5, Exemption 3). As to game licences, see pp. 246 *et seq.*, *post*.

(*b*) *Ibid.*, s. 7.

SECT. 2. Licences required.

Elsewhere the employer, who must, however, be a person having the right to kill game on lands in England or Scotland, may do so (*c*).

Such a licence may be obtained by the lord or employer in the same manner as he would obtain a game licence for himself (*d*). It is an annual licence expiring on the 31st July in each year, and the duty payable on it is £2 (*e*). Should the servant in respect of whom it was taken out leave the service before the 31st July next ensuing the licence is available for his successor up to that date without payment of any further duty (*f*).

This licence, however, is strictly local in its character, and it does not entitle the gamekeeper to kill game on any land on which his employer has not a right to do so (*g*).

Selling game.

504. A game licence does not enable the gamekeeper to sell game except on the account and with the written authority of his employer (*h*). In order to be able to sell game without these restrictions the gamekeeper must hold an annual licence to kill game, the duty payable on which is £3 (*i*).

Gun licence.

505. A gamekeeper who, though not required to kill game, is required to kill deer or rabbits in an inclosed place must obtain a gun licence (*k*).

A gun licence is not in any case transferable (*l*).

A gamekeeper who has neither game licence nor gun licence can assist his employer or any other person having the required licence (*m*), and can carry his gun for him, but he may not use it himself nor allow a third party to do so (*n*).

(*c*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 2.

(*d*) As to this, see p. 249, *post*.

(*e*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 7.

(*f*) *Ibid.*, s. 8, on indorsement by the issuing authority; or in the case of a gamekeeper on a manor if his deputation or appointment is revoked (*ibid.*).

(*g*) *Ibid*, s. 9. Elsewhere he can only assist his employer to kill game if his employer has a game licence (*ibid.*, s. 5, Exemption 3). If he kills or takes game, or uses a gun, dog, net, or other engine or instrument for that purpose elsewhere, he is liable to the same penalty to which he would have been liable had he no licence at all (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 6), namely, £5, together with the costs of the conviction, and this is in addition to the revenue penalty of £20 (Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4); see pp. 246, 247, *post*. Should he kill or take elsewhere not game, but woodcock, snipe, quail, landrail, rabbits, or deer, he is liable to the revenue penalty only.

(*h*) See Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 17. "Game" includes only hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. He does not require a licence to enable him to sell, *e.g.*, woodcock or rabbits.

(*i*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 13; see pp. 246 *et seq.*, *post*.

(*k*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7; see pp. 251 *et seq.*, *post*; a game licence is not required (Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exceptions 2 and 5).

(*l*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 5.

(*m*) Except a gamekeeper acting under a deputation or appointment (Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exemption 3).

(*n*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exemption 3; Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7 (3). He need not produce his own licence (*Scarth* v. *Gardener* (1831), 5 C. & P. 38; and see pp. 251, 252, *post*).

SECT. 3.—*Powers.*

Powers of gamekeepers.

506. A gamekeeper (*o*) who has a licence to kill game has the right to call upon any person whom he may find anywhere doing an act for which such a licence is required to produce his licence (*p*) for the purpose of being read, and, if required, a copy being taken of it, but if a gamekeeper himself has no such licence his right to call upon any other person to produce one is confined to such persons as he may find doing an act for which a licence is required upon the lands on which his employer has the right to the game (*q*). Whether he himself is licensed or not, if he finds anyone trespassing upon such lands in the daytime in search or pursuit of game or woodcock, snipe, quail, landrail, or rabbits, he may require the trespasser forthwith to quit the land and also to state his christian name, surname, and place of abode (*r*).

Should the trespasser refuse to state his real name or place of abode, or should he give such a general description of the latter as to be illusory for the purpose of discovery, or should he wilfully continue or return upon the land, the gamekeeper, or anyone acting by his order or in his aid, may apprehend him and convey him or cause him to be conveyed as soon as conveniently may be before a justice of the peace (*s*). If the offender cannot be brought before a justice within twelve hours from the time of his arrest he must be released, but he may be proceeded against subsequently by summons or warrant (*a*).

If the gamekeeper finds five or more persons so trespassing

(*o*) As to deerkeepers, see p. 263, *post*.

(*p*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 10. As to what acts require a game licence, see p. 241, *ante*, and p. 246, *post*. If the licence is not produced on demand the gamekeeper may call for the name and address of such person; a refusal to give which, or a refusal to allow the licence to be read or copied, renders the offender liable to a penalty of £20 (*ibid.*).

(*q*) *Ibid.*

(*r*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31. He cannot, however, interfere with persons hunting or coursing with hounds or greyhounds and being in fresh pursuit of any deer, hare, or fox already started upon any other land nor with any person *bonâ fide* claiming and exercising any right or reputed right of free warren or free chase, nor any gamekeeper lawfully appointed within the limits of any free warren or free chase, nor with any lord or steward of the Crown of any manor, lordship, or royalty, nor any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship, or royalty (*ibid.*, s. 35). As to appointment in the case of manors etc., see p. 245, *post*. The other servants of the employer have the same powers (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31). Daytime extends from the commencement of the last hour before sunrise to the close of the first hour after sunset (*ibid.*, s. 34); compare note (*e*), p. 228, note (*t*), p. 233, and notes (*b*) and (*c*), p. 239, *ante*.

(*s*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31; and see p. 228, *ante*. It is doubtful whether a gamekeeper can arrest a trespasser who has refused to give his name and address upon request, but who has not previously been required to quit the land. In *R.* v. *Long* (1836), 7 C. & P. 314, it was held that he could not, but in a rather more recent case (*R.* v. *Prestney* (1849), 3 Cox, C. C. 505) the contrary was held; see the considerations which make this appear the more reasonable view *ibid.*, at p. 507, note (*a*).

(*a*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31; and see p. 232, *ante*. The reason for his not being brought before the justice must be the absence of the latter or distance of the latter's residence or some other reasonable cause (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 31). The mode and time for proceedings and penalties are the same as for other offences against this Act. As to these, see p. 232, *ante*.

SECT. 3. Powers.

together, one or more of them being armed with a gun, and any of them attempt by violence, intimidation, or menace to prevent his approach for the purpose of ordering them to quit or to state their names or places of abode, they are all liable to an additional penalty not exceeding £5 and costs (*b*).

Powers of arrest.

507. A gamekeeper has the following powers of arrest at night, but only on land of which his employer is either lord of the manor, owner, or occupier, or on which his employer has the right of free chase or free warren (*c*).

If he or any of his assistants finds upon such land, whether open or inclosed, or upon the part of any public wood, highway, or path which at either side thereof adjoins such land, or at the opening, outlets, or gates from the land into any such public wood, highway, or path, any person unlawfully taking or destroying game or rabbits, he may seize and arrest him on the spot, or in case of pursuit in any place to which he may have escaped therefrom, and deliver him as soon as may be to a policeman, with a view to his being brought before two justices of the peace (*d*).

A gamekeeper has the same right of arrest on the spot or after pursuit if he finds anyone either actually on or entering on such land with a gun, net, engine, or other instrument for the purpose of taking or destroying game (*e*). Rabbits are not here comprised in the term "game," but the gamekeeper or his assistants may arrest offenders actually on or entering on such land, whether with or without nets, engines or other instruments, for the purpose of destroying game or rabbits, if the offenders are three or more in number and anyone of them is armed with an offensive weapon (*f*).

Gamekeepers whose employers are neither owners nor occupiers, but merely have shooting rights, have no such right of arrest (*g*).

(*b*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 32; see p. 230, *ante*.

(*c*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 2; Night Poaching Act, 1844 (7 & 8 Vict. c. 29). Night extends from the close of the first hour after sunset to the beginning of the first hour before sunrise (Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 12, and compare note (*e*), p. 228, note (*t*), p. 233, and notes (*b*) and (*c*), p. 239, *ante*). Any other servant of the employer has the same right (Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 2). A gamekeeper who is appointed such by an agent, himself appointed by the lord of a manor, has sufficient authority from the lord to arrest night poachers (*R.* v. *King* (1884), 48 J. P. 149).

(*d*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1; Night Poaching Act, 1844 (7 & 8 Vict. c. 29). Note that "game" here only includes those in the strict definition thereof, namely, hares, pheasants, partridges, grouse, heather or moor game, black game, and bustards (Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 13, and see p. 208, *ante*). The keeper must not wait on the highway for poachers to emerge thereon from the land of his employer where they have been poaching, although he may pursue them from the land and then arrest them anywhere (*R.* v. *Meadham* (1848), 2 Car. & Kir. 633). Notice that he intends to arrest the offender is not required, nor is a written authority from the employer (*R.* v. *Payne* (1833), 1 Mood. C. C. 378; *R.* v. *Price* (1835), 7 C. & P. 178).

(*e*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), ss. 1, 2. Snares and nets etc. are *ejusdem generis* (*Allen* v. *Thompson* (1870), L. R. 5 Q. B. 336).

(*f*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 9. Though no powers of arrest are expressly mentioned in this section, they are to be imported, as the offence is merely an aggravation of that dealt with in *ibid.*, s. 1 (*R.* v. *Ball* (1832), 1 Mood. C. C. 330). As to what is an offensive weapon, see note (*g*), pp. 234, 235, *ante*.

(*g*) *R.* v. *Addis* (1834), 6 C. & P. 388; *R.* v. *Price* (1851), 5 Cox, C. C. 277; and see *R.* v. *Wood* (1859), 1 F. & F. 470.

SECT. 3. POWERS.

Seizure of instruments.

Gamekeepers appointed by a lord or steward of a manor, and expressly authorised by him to do so, may seize for the use of the lord any dogs, nets, and other engines and instruments he finds being used within the limits of the manor for the purpose of taking or killing game by a person who has no licence to kill game (*h*). Except in the cases and within the limits so far dealt with (*i*), gamekeepers have no special right of arrest, but they have the right in common with everyone else of arresting persons committing an indictable offence at night anywhere (*k*), or deer-stealing (*l*), or killing hares or rabbits in a warren (*m*), or stealing game or other birds or rabbits kept in captivity (*n*) at any time of night or day.

Firing crops etc.

Gamekeepers are, in common with any other servants of the owner, entitled to arrest persons unlawfully and maliciously setting fire to crops, whether standing or cut, or to woods, or to any heath, gorse, furze, or fern (*o*). They may also inform against persons

(*h*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 13. As to the persons who may "appoint" a gamekeeper, see p. 240, *ante*. The dog, net etc. must be in actual use (*Wingfield* v. *Stratford* (1752), 1 Wils. 315; *Rogers* v. *Carter* (1768), 2 Wils. 387; *R.* v. *Gardner* (1738), 2 Stra. 1098). The phrase "other engines" includes "snares" (*Allen* v. *Thompson* (1870), L. R. 5 Q. B. 336). It does not include guns, which are purposely omitted (*Daddle* v. *Hickton* (1868), 17 L. T. 549). Compare Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 3, where the word "gun" appears between the words "dog" and "net"; compare also Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 16. As to seizing of guns by a constable under the Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), see p. 238, *ante;* compare *Protheroe* v. *Mathews* (1833), 5 C. & P. 581. The articles seized may be kept, and if a dog is seized he may perhaps be killed (*Kingsnorth* v. *Bretton* (1814), 5 Taunt. 416; and see *Roy* v. *Beaufort* (*Duke*) (1741), 2 Atk. 190); but this measure should not be resorted to unless it is necessary for the preservation of game then being pursued (*Vere* v. *Cawdor* (*Lord*) (1809), 11 East, 568). The dog of the keeper of a neighbouring manor cannot be seized (*Rogers* v. *Carter*, *supra*). These powers given to gamekeepers on a manor must be exercised, if not by themselves, by someone acting immediately on a particular order (*Bird* v. *Dale* (1817), 7 Taunt. 560). "Game" includes only that in the definition, not those other birds etc. to kill which a licence is required; see p. 208, *ante*.

(*i*) See p. 244, *ante*. Outside the limits of their employer's ground gamekeepers may only arrest with the authority of the owner or gamekeeper of the land whereon the offender is found, unless they have pursued the offender from their employer's ground (*R.* v. *Davis* (1837), 7 C. & P. 785).

(*k*) Prevention of Offences Act, 1851 (14 & 15 Vict. c. 19), s. 11. Night poaching by one person alone, if twice previously convicted, is such an offence (Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1). So, too, is night poaching by three or more persons, whether any of them has previously been convicted or not, if one or more of them is or are armed with an offensive weapon (*ibid.*, s. 9, and see p. 234, *ante*). The definition of night in the Prevention of Offences Act, 1851 (14 & 15 Vict. c. 19), is from 9 p.m. to 6 a.m., which is a different definition from that in the Night Poaching Act, 1828 (9 Geo. 4, c. 69; compare note (*c*), p. 244, *ante*); but this difference does not prevent the application of the former Act to night poaching (*R.* v. *Sanderson* (1859), 1 F. & F. 598).

(*l*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 12, 13, 103; and see p. 262, *post*.

(*m*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 17, 103; see p. 215, *ante*.

(*n*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 21, 103.

(*o*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 16, 61. It seems that the gamekeeper employed by a shooting tenant may be justified even in

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laying down poisoned meat or grain, whether on their employer's ground or elsewhere (*p*).

Part VII.—Licences.

SECT. 1.—*Game Licences.*

Game licences.

508. The possession of a game licence is required before the right to kill or take game can be exercised, whether by shooting or in any other manner. While possession of a licence is required by the provisions of the Game Act (*q*), the licence itself is granted, not under that Act, but under the Game Licences Act, 1860 (*r*). The authority which grants the licence is the county council, in whom is vested the right of administering the duties levied under the latter Act (*s*). The killing or taking of game by a person who has no licence is an offence under both these Acts (*t*). Proceedings for the one offence are not exclusive of proceedings for the other, and the penalties are cumulative (*a*).

Killing or taking game without licence.

Under the Game Act the offence consists in killing or taking any game or using any dog, gun, net, or other engine for the purpose of searching for or killing or taking game without a licence (*b*), and is punishable upon conviction before two justices of the peace by a fine not exceeding £5 and costs (*c*). The information may be laid by anyone (*d*), but must be laid within three months of the commission of the offence (*e*); and it may be received, and the summons may be issued, by one justice (*f*).

burning strips of heather, with a view of arresting the progress of a fire already burning, if this can be shown to be necessary for the preservation of game on the part of the property not yet burned (*Cope* v. *Sharpe*, [1910] 1 K. B. 168; and compare S. C. (1911), *Times*, 12th January).

(*p*) Poisoned Grain Prohibition Act, 1863 (26 & 27 Vict. c. 113), s. 5; Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115), s. 4.

(*q*) Game Act, 1831 (1 & 2 Will. 4, c. 32).

(*r*) 23 & 24 Vict. c. 90.

(*s*) Finance Act, 1908 (8 Edw. 7, c. 16), s. 6; Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470). The authority in a county borough is the council of the county borough (*ibid.*, art. xvii.).

(*t*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 23; Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4.

(*a*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 23.

(*b*) *Ibid.* To kill and take and to use a dog, gun etc. are separate offences, but an offender who kills game with a gun cannot be convicted of more than one of these offences on the same occasion (compare *Laxton* v. *Jefferies* (1893), 58 J. P. 318), and it seems that the killing of game with a gun more than once on the same day does not amount to more than one offence (*R.* v. *Mathews* (1711), 10 Mod. Rep. 26; *R.* v. *Lovet* (1797), 7 Term Rep. 152). *Quære*, if a different means of killing or taking were employed or the game killed in different places.

(*c*) Game Act, 1831 (1 & 2 Will 4, c. 32), s. 23.

(*d*) *Midelton* v. *Gale* (1838), 8 Ad. & El. 155; *Morden* v. *Porter* (1860), 7 C. B. (N. S.) 641.

(*e*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 41.

(*f*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 3. As to procedure before justices, see title MAGISTRATES.

Under the Game Licences Act, 1860 (*g*), the offence consists in taking, killing, or pursuing the birds and animals protected by the Act, or in aiding or assisting thereat in any manner by any means whatever, or in using for the purpose any dog, gun, net, or other engine without a licence, and is punishable upon conviction by a court of summary jurisdiction by a fine of £20. The information must be laid within six months of the commission of the offence (*h*); and it must be in the name of an officer of the county council (*i*) or of the Attorney-General. The proceedings can be begun only by order of the council of the county in which the offence is committed (*k*). In default of payment in either case the offender may be imprisoned (*l*).

Extent of Game Licences Act.

509. The birds and animals which are protected by the provision of the Game Act requiring possession of a licence are those enumerated in the definition of game in that Act (*m*), but the Game Licences Act, 1860 (*n*), which the licence is issued under, extends the protection to woodcock, snipe, quail or landrail, rabbits, and deer.

Effect of Game Acts.

The effect of the two enactments is therefore to make it a punishable offence to take or kill or attempt (*o*) to take or kill any of these birds or animals either with or without a dog, gun, net, or other engine; but while the penalties sanctioned by either or both of these Acts may be enforced against an offender in the case of "game," only those contained in the Game Licences Act, 1860 (*p*), can be enforced against an offender in the case of the other birds and animals mentioned. The Game Licences Act, 1860 (*p*), requires a licence to be taken out by any person aiding or assisting in any manner in the taking, killing, or pursuing by any means whatever of the birds

(*g*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4. To take, kill and pursue constitutes one offence (*Laxton* v. *Jefferies* (1893), 58 J. P. 318); see note (*b*), p. 246, *ante*.

(*h*) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 53, applies the general rules in cases coming under the Summary Jurisdiction Acts to excise proceedings (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 3).

(*i*) The powers and duties formerly belonging to officers of the Inland Revenue are now vested in such officers of the county council as the latter may see fit to delegate them to (Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. ix.).

(*k*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21 (1). The officials of the county council are subject to the same liabilities as were officers of Inland Revenue (Order in Council, 19th October, 1908, *supra*). The authority to commence the proceedings need not be proved in evidence where it is already stated in the information (*Dyer* v. *Tulley*, [1894] 2 Q. B. 794; *Hargreaves* v. *Hilliam* (1893), 58 J. P. 655).

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5.

(*m*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 2; see p. 208, *ante*.

(*n*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4. In fact, however, the number of persons requiring a licence to shoot rabbits is greatly reduced owing to s. 5, Exception 2, *ibid.*; see p. 248, *post*.

(*o*) To walk about with a dog or gun on land where there is game, or to point a gun at game, is evidence of commission of an offence (*R.* v. *Davies* (1795), 6 Term Rep. 177; *Hebden* v. *Henty* (1819), 1 Chit. 607); compare *Assessed Tax Appeal Cases*, 2189, 2292, 2505—2507, 2523, 2561). Where several persons, all of whom have no licence to kill game, fire at the same bird, all commit an offence, although it is impossible to identify the person who killed the bird (*Hunter* v. *Clark* (1902), 66 J. P. 247).

(*p*) 23 & 24 Vict. c. 90.

SECT. 1. Game Licences.

or animals mentioned in that Act (*q*), unless he is doing so in the company or presence and for the use of a duly licensed person, who is by virtue of such licence then and there using his own dog, gun, net, or other engine for the taking or killing of such birds and animals and who is not acting therein by virtue of any deputation or appointment (*r*).

Exemptions: (i.) Absolute.

510. Members of the Royal Family (*s*) and gamekeepers appointed on behalf of the Crown by the Commissioners of His Majesty's Woods, Forests, and Land Revenues, and under the authority of any Act of Parliament relating to the land revenues of the Crown (*t*), do not require a game licence in any case.

(ii.) Limited.

The following persons do not require a game licence for the limited purpose specified in each case:—(1) Persons authorised under the Hares Act to kill hares upon land to which such authority extends (*u*); (2) the occupier and persons duly authorised by him for the purpose of killing ground game on the land in his occupation (*a*); (3) the proprietor of any warren or of any inclosed ground whatever, or the tenant of lands or persons directed or permitted by him to take and destroy rabbits thereon (*b*); (4) the owner or occupier of inclosed lands and persons directed or permitted by him to take and kill deer thereon (*c*); (5) persons taking woodcock and

(*q*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4.

(*r*) *Ibid.*, s. 5, Exemption 3. The effect of this is to exempt beaters and other assistants from the necessity of being licensed. But such unlicensed beaters etc. must not assist a gamekeeper who holds his position by deputation or appointment. Moreover, they apparently must not use or lend the use of any dog of their own, even to a licensed person who is by virtue of his licence then and there taking and killing game etc. Similarly, a loader may carry his employer's gun and thus aid in killing game etc., but he must not carry a gun of his own, and he must not fire either his own or his employer's gun; compare *Ex parte Sylvester* (1829), 9 B. & C. 61, and see pp. 241, 242, *ante*.

(*s*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exemption 1.

(*t*) *Ibid.*, Exemption 2.

(*u*) *Ibid.*, Exemption 4; Hares Act, 1848 (11 & 12 Vict. c. 29), s. 1. The persons authorised are any person in actual occupation of any inclosed lands, or any owner thereof who has the right of killing game thereon, or any person directed or authorised by him in writing in accordance with the terms of the Act. Such owner or occupier must not, however, give authority to more than one person in regard to his land in any one parish. The authority, or a copy of it, must be delivered to the clerk of the petty sessions, who is to register it, and who must receive notice if it is revoked; unless revoked it remains good until the 1st February in the year following that in which it is granted (*ibid.*, s. 2).

(*a*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 4.

(*b*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exception 2. This does not apply to Ireland. A warren, unlike a forest or chase, is an incorporeal hereditament, and the rights over it may be held by one who is not the actual owner of the soil. A shooting tenant who has rented the warren may therefore claim to be entitled by this provision to shoot without a licence; compare *Assessed Tax Appeal Cases*, 257; *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223. It is perhaps doubtful whether "the persons directed or permitted by him" means persons directed or permitted (1) either by the proprietor etc., or the tenant of lands, or (2) by the tenant of lands only; but the probability is that persons directed or permitted by the tenant of lands only is correct, as the phrase is in close conjunction with the tenant of lands etc.

(*c*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exception 5. Here the persons directed or permitted to take and kill are those directed or permitted by the owner or occupier, to whichever of the two the right to take or kill the deer on the inclosed land may belong.

snipe with net and springes (*d*), or pursuing and killing hares, whether by coursing with greyhounds or by hunting with beagles or other hounds (*e*), or pursuing and killing deer by hunting with hounds (*f*).

Form of licence.

511. The form of the licence is to be such as the Commissioners of Inland Revenue have hitherto provided, with such adaptations as are necessary owing to the county council having become the licensing authority (*g*). It must denote the amount of duty charged thereon (*h*), and must contain the proper christian name and surname and place of residence of the person to whom it is granted, and must be dated on the day on which it is actually issued (*i*).

Granting of licences.

Licences are to be granted, signed, and issued by such officers of the Post Office as are authorised by the Postmaster-General at the offices at which the county council shall provide for the issue of licences (*k*).

Duration of licence.

512. A game licence is in force on the day of issue and from the time of issue (*l*), so that an offence committed on the day of issue but before the time of issue is not condoned by the issue of the licence on that day (*m*).

A game licence continues in force until the close of the day on which it is stated to expire (*n*). During the time that it is in force it is available in any part of the United Kingdom (*o*).

The licence will be forfeited if the holder is convicted of trespassing in the daytime upon lands in search of game in England or Scotland (*p*).

Production of licence.

513. If any person is discovered doing any act whatever in Great Britain for which a licence to kill game is required by the

(*d*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 5, Exception 1.
(*e*) *Ibid.*, Exception 3.
(*f*) *Ibid.*, Exception 4.
(*g*) Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. ii. This form will continue until the Treasury prescribe any alteration. Copies will continue to be printed or provided by the Commissioners of Inland Revenue (*ibid.*).
(*h*) The rates at which duty is charged for the issue of a licence are:—For a licence issued before the 1st November and to expire on the 31st July in the year following, £3; for a licence issued before the 31st October and to expire on the 31st October in the same year, £2; for a licence issued on or after the 1st November, and to expire on the 31st July in the year following, £2 (Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16, as amended by the Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), ss. 4, 6); for a licence for a continuous period of fourteen days, to be specified on the licence, £1 (Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), s. 5). As to gamekeepers' licences, see pp. 241 *et seq.*, *ante*.
(*i*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16; and see note (*l*), *infra*.
(*k*) Order in Council, *supra*, art. iv. The county councils are to provide for the issue of local taxation licences so as to enable persons to obtain them near their residences (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 20 (5) (a)).
(*l*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16. The time at which the licence is issued is now stated on the face of the licence.
(*m*) *Campbell* v. *Strangeways* (1877), 3 C. P. D. 105.
(*n*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16.
(*o*) *Ibid.*, s. 18. This provision does not, however, apply to licences granted for gamekeepers or servants (*ibid.*); see p. 242, *ante*.
(*p*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 11; Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30. The corresponding Scottish Act is the Game (Scotland) Act, 1832 (2 & 3 Will. 4, c. 68).

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Game Licences Act, 1860 (*q*), he may be called upon by any of the persons mentioned below to produce his licence. Should he fail to produce his licence, the person calling upon him to do so may next require him forthwith to declare his christian name and surname, and place of residence, and the place at which he took out his licence (*r*). Any person who when so called upon refuses to produce his licence or to give the information required above, or who produces a false or fictitious licence, or who refuses to permit any licence which he produces to be read, or a copy thereof or any part thereof to be taken, is to be fined £20 (*s*).

Who may demand production of licence.

The persons by whom the demand for the production of the licence and for such information may be made are any officer of the council of the county where such person then is, or any person who has duly taken out a proper licence to kill game, or any lord or gamekeeper of the manor, royalty, or lands where the person on whom the demand is made is discovered committing an act which requires a licence, or the owner, landlord, lessee, or occupier of such lands (*t*). The demand must be made either upon the lands where the person on whom the demand is made was discovered or so soon after he has left such lands that the whole incident forms part of the same transaction (*a*).

Licence register.

514. The clerk to the council of each county is required to keep a register of the names and residences of the several persons to or for whom licences to kill game have been granted in that county, distinguishing the persons acting under any deputation, appointment, or authority from others, and the manors, royalties, or lands for which deputations, appointments or authorities have been granted, and also distinguishing the rate of duty paid for such licences (*b*).

(*q*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 10.

(*r*) *Ibid.*

(*s*) *Ibid.* No offence is committed if the person called upon refuses to produce his licence but does not further refuse to give his name etc. (*Molton* v. *Rogers* (1802), 4 Esp. 215). If the person refuses to give his name the offence is complete, even if the further question as to the place at which the licence was taken out is not asked (*Scarth* v. *Gardener* (1831), 5 C. & P. 38).

(*t*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 10. As to officers of the county council, see note (*i*), p. 247, *ante*. A shooting tenant who is not in occupation of the land is not entitled to make the demand unless he himself holds a licence (*ibid.*). A gamekeeper, except upon a manor etc., is in the same position (*ibid.*). A duly licensed person who makes the demand is not called upon himself to produce his licence (*Scarth* v. *Gardener*, *supra*). If the person discovered is found not to have taken out a licence, proceedings can be taken only by an excise officer (see p. 247, *ante*), unless he has also committed an offence against the Game Act, in which case proceedings may be instituted for that offence (but not for the neglect to take out a licence) by anyone; see p. 246, *ante*.

(*a*) *Scarth* v. *Gardener*, *supra*.

(*b*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 12; Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. iv. This provision authorises publication in the newspapers, but this method of publication has fallen out of use. In practice the lists are published in the post offices or on the doors of the churches of the places where the licences are issued. A list will also be supplied to any person requiring it by the local supervisor of excise.

Possession of a game licence exempts the holder from the necessity of taking out a gun licence to enable him to carry a gun (*c*).

Proceedings under Gun Licence Act.

Any person against whom proceedings are brought for doing an act for which a game licence is required without having taken out such a licence, and who in the course of such proceedings is proved to have used or carried a gun without having in force a proper licence under the Gun Licence Act, 1870 (*d*), is not entitled to be wholly acquitted if the charge relating to the game licence fails, but may be convicted by the court before which he is charged of the offence disclosed in relation to the gun licence (*e*).

SECT. 2.—*Gun Licences.*

Persons requiring gun licence.

515. A gun licence is required in the case of every person who uses or carries a gun (*f*), elsewhere than in a dwelling-house or the curtilage thereof (*g*) and who is not specially excepted by statute (*h*).

Exceptions.

The exceptions include (*i*) (1) holders of a game licence actually in force (*j*); (2) persons carrying a gun which belongs to the holder of a game licence or a gun licence actually in force by the order of and for the use of such licence-holder only (*k*); (3) the occupier of any land using or carrying a gun for the purpose only of scaring birds or of killing vermin on such lands, or any persons using or carrying a gun for such a purpose by the order of such an occupier, who

(*c*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7 (2).

(*d*) 33 & 34 Vict. c. 57.

(*e*) Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), s. 6.

(*f*) The term "gun" includes a firearm of any description, and an air gun or any other kind of gun from which any shot, bullet, or other missile can be discharged (Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 2). Even a toy pocket pistol has been held to be included in this definition (*Campbell* v. *Hadley* (1876), 40 J. P. 756). Where a gun is carried in parts by two or more persons in company, each person is liable for "carrying a gun" if he has no licence (Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 8). The words "in company" are essential. If, for instance, the barrels were carried by some one unaccompanied by another carrying the stock, they could not be used as a gun, and so would not come within the provision.

(*g*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7. The term "curtilage" is not defined. An orchard at the back of a dwelling-house and separated from it by a garden has been held not to be within the curtilage (*Asquith* v. *Griffin* (1884), 48 J. P. 724; see also *Inland Revenue Commissioners* v. *Goodfellow* (1881), 45 J. P. 588). It would appear that to be within the same fence as a dwelling-house would bring a place within the curtilage; see an article (28th April, 1883), 47 J. P. 25, where the subject is treated at length.

(*h*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7.

(*i*) Other persons excepted are persons in the service of the Crown when engaged on target practice, gunsmiths etc. in the exercise of their calling, and common carriers; see titles REVENUE; ROYAL FORCES; and see note (*b*), p. 253, *post*.

(*j*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7 (2); and see p. 246, *ante*.

(*k*) *Ibid.*, s. 7 (3). Such persons, however, in order to be excepted, must comply with the request of any officer of Inland Revenue or constabulary, or any constable, owner, or occupier of the lands on which the gun is carried, to give their own true name and address, and also the true name and address of their employer. Default in complying would render the gun-carrier liable to a penalty, both for non-possession of a licence and for refusing the information he is required to give; see pp. 252, 253, *post*.

SECT. 2. Gun Licences.

is also the holder of a game licence or gun licence actually in force (*l*).

The onus of proof that he is within the exception lies upon the person charged in the event of proceedings being taken (*m*).

Expiry.

516. A gun licence is an annual licence (*n*). At whatever date it is taken out it expires on the 31st July next ensuing (*o*).

Form and mode of issue.

The form of the licence and the mode of issuing it follows the same rule as that affecting game licences (*p*). The licence must contain the christian name and surname and place of residence of the person to whom it is granted, and must be dated on the day of issue (*q*). It is forfeited if the holder is convicted of the offence of trespassing in the daytime in search of game (*r*).

Extent.

The possession of a gun licence does not entitle the holder to use, carry, or have in his custody or possession any firearm in any part of the United Kingdom where the use or possession of firearms may be forbidden by Act of Parliament or permitted only on obtaining a special licence from an authority empowered to grant one (*s*).

Offence of carrying gun without licence.

The offence of using or carrying a gun elsewhere than in a dwelling-house or the curtilage thereof without a licence is punishable by a fine of £10 (*t*). Proceedings for the recovery of such a fine must be in the name of an officer of the council of the county where the offence was committed, and can only be begun by order of the county council (*a*).

Production of licence.

517. Any officer of the county council, or any officer of constabulary or any constable, may demand from any person he sees

(*l*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7 (4). An occupier exercising his rights under the Ground Game Act, 1880 (43 & 44 Vict. c. 47), is not exempted from the duty of having a gun licence (*ibid.*, s. 4; and see p. 221, *ante*). The term "vermin" is undefined by statute. That rabbits are not included in it may perhaps be inferred from the provision of the Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 4. The Scottish courts have decided that they are not included (*Lord Advocate* v. *Young* (1898), 62 J. P. 199). The idea of noxiousness is the dominant idea implied in the word "vermin" extinguishing the thought of any small value which such animals may possess by reason of their skins or otherwise, and most vermin have, roughly speaking, no value at all (*ibid.*, *per* the LORD PRESIDENT, at p. 783); and compare *Hannam* v. *Mockett* (1824), 2 B. & C. 934, where rooks were held to be a species of birds *feræ naturæ*, destructive in their habits, not known as an article of food, and unprotected by any Act of Parliament.

(*m*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7.

(*n*) *Ibid.*, s. 3. The amount to be paid for it at any date is 10*s.* (*ibid.*).

(*o*) Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), s. 6.

(*p*) See p. 249, *ante*.

(*q*) Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), s. 6. It is in force from the actual time of issue on that date. Obtaining a licence later in the course of a day on which an act has been done for which a licence was required does not condone the omission; see p. 249, *ante*.

(*r*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 11; Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 30. In Scotland the corresponding Act is the Game (Scotland) Act, 1832 (2 & 3 Will. 4, c. 68).

(*s*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 12.

(*t*) *Ibid.*, s. 7.

(*a*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21 (1); Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. i., transferring to the county council the duties of the Inland Revenue authorities; and see p. 247, *ante*.

using or carrying a gun the production of his licence (*b*), and for that purpose may enter and remain as long as may be necessary upon any lands or premises other than a dwelling-house or the curtilage thereof (*c*).

Effect of refusal to produce gun licence.

A person who upon such demand does not produce a gun licence or game licence and permit the officer or constable to read it may be required by such officer or constable to declare to him immediately his christian name and surname and place of residence (*d*). If he refuses to do so he is liable to a fine of £10, and may be arrested by the officer or constable and brought before any justice of the peace having jurisdiction at the place where the offence was committed (*e*).

Penalty.

The court may in the case of a first offence reduce the fine to any sum they think proper (*f*), but in the case of a second or subsequent offence the minimum fine they may impose is one quarter of the full penalty made payable by the statute (*g*). In default of payment the offender may be imprisoned for any period not exceeding one month (*h*). Proceedings for the recovery of the fine in this case may be taken without any order of the county council (*i*).

Gun licence register.

518. A register of licences must be kept by the clerk of the council of the county where they are granted (*k*). It must contain the christian name and surname and place of residence of every person licensed and the date of each licence. The register for the current year and the preceding year must be open at any convenient time for inspection by any justice of the peace, officer of constabulary, constable, or any holder of a gun licence (*l*).

SECT. 3.—*Dog Licences.*

Dog licences.

519. Subject to certain exceptions (*a*), a licence is required for every dog kept for sporting or for any other purpose (*b*).

Production.

The holder of a licence may be requested by any officer of the

(*b*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 9. Persons in the naval, military, or auxiliary services, or in the constabulary or police force, using or carrying a gun in the performance of their duty are excepted (*ibid.*); see titles POLICE; ROYAL FORCES; and see note (*i*), p. 251, *ante*.

(*c*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 10.

(*d*) *Ibid.*, s. 9.

(*e*) *Ibid.*

(*f*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

(*g*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 9; and this is so whether it appears upon the information to be a second offence or not; see *Murray* v. *Thompson* (1888), 22 Q. B. D. 142.

(*h*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 9; as to the power of justices to reduce the prescribed period of imprisonment, see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5; and title MAGISTRATES.

(*i*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21 (2). and see note (*a*), p. 252, *ante*. Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. xiv.

(*k*) *Ibid.*

(*l*) Gun Licence Act, 1870 (33 & 34 Vict.c. 57), s. 6.

(*a*) See title ANIMALS, Vol. I., pp. 403—405.

(*b*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5), s. 3. Omission to take out a dog licence is not a trifling offence such as would justify a court of summary jurisdiction in discharging the offender without punishment under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 21), s. 16 (*Phillips* v. *Evans*, [1896] 1 Q. B. 305); and see title MAGISTRATES.

SECT. 3. Dog Licences.

county council or police constable to produce and deliver his licence to be examined and read, and if the holder does not within a reasonable time comply with the request he is liable to a penalty of £5 (*c*).

Penalties.

520. Proceedings to recover the penalty named may be taken either by the county council authorities (*d*) or by the police (*e*). If they are taken by the latter costs may be awarded (*f*).

In the case of a first offence the amount of the fine may be reduced to any sum (*g*); but in the case of a second or subsequent offence, while it may be so reduced on a prosecution by the police (*h*), on a prosecution by the county council authorities it can be mitigated only to one quarter of the full penalty (*i*).

Dog licence register.

521. A register of licences must be kept by the clerk of the council of the county in which they are granted (*k*). It must specify the name and place of abode of every person licensed and the number of dogs which he is licensed to keep. The register for the current year and the preceding year must be open at any convenient time to the inspection of any justice of the peace or constable or other officer of the peace (*l*).

SECT. 4.—*Licences to Deal in Game.*

Licences to deal in game.

522. In order to deal in game, that is, to sell game either

(*c*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5), s. 9. What is reasonable time is a question of fact in each case. There is no provision for compelling licences to be taken out for dogs in the place where they are kept, and in cases where, for instance, the licence is taken out and retained in London, while the dog is "kept" in Scotland, a considerable time would no doubt be held to be reasonable; compare *R.* v. *Seears* (1875), *Times*, 7th August (Middlesex Sessions).

(*d*) Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. i.; Dog Licences Act, 1867 (30 & 31 Vict. c. 5), s. 4. As to the mode of taking such proceedings, see Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21; and p. 247, *ante*.

(*e*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23. The proceedings must be in accordance with the Summary Jurisdiction Acts, 1843 and 1879 (11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49) (Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), s. 26). The penalty when recovered on a prosecution by the police is payable half to the council of the county where the penalty is recovered and half to the superannuation fund of the police force to which the constable who instituted the prosecution belongs (Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23 (2)).

(*f*) *Ibid.*, s. 23 (1).

(*g*) *Ibid.*; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

(*h*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23 (1).

(*i*) Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 78; and this is so whether it appears on the information to be a second offence or not (*Murray* v. *Thompson* (1888), 22 Q. B. D. 142). As to the duties formerly performed by the officers of Inland Revenue being now executed by the officers of the county council, see note (*i*), p. 247, *ante*.

(*k*) Order in Council, *supra*, art. xiv. Where application is made for a certificate of exemption, the clerk to the justices to whom the application is made must forward the declaration of the applicant or the consent of the justice thereon to the clerk to the council of the county where the applicant resides. The latter is to issue the certificate of exemption (*ibid.*, art. xiii.).

(*l*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5), s. 6. Note that apparently a private person is not entitled to inspect the register.

wholesale or retail to any comer, a person must be the holder of two licences, the first granted by the district council (*m*), the second, which is a revenue licence, by the county council (*n*).

Granting of licence.

523. The district council licence is obtained upon application at a special meeting of the council held for the purpose of granting such licences (*o*). The provisions governing the meetings of the former licensing authority, which it is presumed are now applicable to such meetings of the council, require notice of them to be given to each of the members seven days before they are held (*p*). Under those provisions a meeting must be held in July, but other meetings may be held for the purpose as often as the council thinks fit (*q*), and may be adjourned, and licences may be granted either at the original meeting or at the adjourned meeting (*r*).

Discretion of district council.

524. With the exception of certain classes of persons to whom licences may not be granted, it is within the discretion of the district council to grant or refuse a licence to anyone (*s*), and there is no appeal from its decision.

Persons not permitted to hold licence.

The excepted classes are innkeeepers (*t*), victuallers, persons licensed to sell beer by retail (*a*), owners, guards, or drivers of any mail coach or other vehicle employed in the conveyance of mails or of any stage coach, stage waggon, van, or other public conveyance, carriers, higglers, and persons in the employment of members of any of such classes (*b*).

Form of licence.

525. The licence is in a form settled by statute (*c*). It is an annual licence (*d*), but at whatever date it is granted it

(*m*) The local licence as first instituted was granted by the justices (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18), but their powers, duties, and liabilities in this regard were transferred to the district councils by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27; in urban districts which are boroughs the term "district council" includes a borough council (*ibid.*, s. 21 (3)); in a county borough they are transferred to the borough council (*ibid.*, s. 32); and see title LOCAL GOVERNMENT).

(*n*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 14. The duties of the Inland Revenue authorities under this Act are now vested in the county council (Finance Act, 1908 (8 Edw. 7, c. 16), s. 6; Order in Council, 19th October, 1908 (Statutory Rules and Orders, 1908, p. 470)). The expression "county council" includes county borough council (*ibid.*, art. xviii.).

(*o*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18.

(*p*) *Ibid.*

(*q*) Stat. (1839) 2 & 3 Vict. c. 35, s. 4, an Act which is repealed by the Revenue Act, 1869 (32 & 33 Vict. c. 14), in all other respects, but is kept alive so far as it deals with game licences by the Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 13.

(*r*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18.

(*s*) *Ibid.*

(*t*) But innkeepers and tavern-keepers may sell game for consumption in their own house provided they have procured it from a licence-holder (*ibid.*, s. 26).

(*a*) Holders of an additional licence to sell beer under the Revenue Act, 1863 (26 & 27 Vict. c. 33), are included in this exception (*Shoolbred & Co.* v. *St. Pancras Justices* (1890), 24 Q. B. D. 346).

(*b*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18.

(*c*) *Ibid.*, Sched. A. Instead of the signature of justices there should now be the seal of the council, which by virtue of the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (7), is a body corporate.

(*d*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18.

SECT. 4. **Licences to Deal in Game.**

expires on the 1st July next ensuing (*e*). No charge is made for the licence.

Provisions of licence.

The licence authorises the holder to sell game at one house, shop, or stall only (*f*), and is granted subject to his affixing to some part of the outside of the front thereof a board with his christian name and surname, together with the words "Licensed to deal in game," inscribed in clear and legible characters upon it (*g*).

Selling at separate places.

526. There is nothing to prevent a person from dealing in game at more than one house, shop, or stall, but he must obtain a separate licence for each (*h*) and affix a separate board at each place (*i*).

Persons trading in partnership with one another (*k*) and companies (*l*) do not require more than one licence for each house, shop, or stall at which they deal in game.

Extent of authorisation.

527. The holder of the licence is authorised to buy game, but only from persons who themselves hold a licence to kill game or a licence to deal in game (*m*).

He may act as the agent of another licensed dealer in selling game sent to him to be sold on that other licensed dealer's account (*n*).

His employees may buy and sell game on his behalf, so long as they are acting in the usual course of their employment and are upon the premises in respect of which he holds his licence (*o*).

(*e*) Stat. (1839) 2 & 3 Vict. c. 35, s. 4.

(*f*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18. Selling game or offering it for sale elsewhere is an offence which causes the licence thereupon to become void (*ibid.*, s. 22), and renders the offender liable upon conviction before two justices to a fine not exceeding £10 and costs (*ibid.*, s. 28).

(*g*) *Ibid.* Selling or offering for sale without a board duly inscribed and affixed is an offence punishable as in the last note. For a form of licence, see Encyclopædia of Forms and Precedents, Vol. XI., p. 118.

(*h*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 28.

(*i*) *Ibid.* Failure to comply is an offence punishable as in note (*f*), *supra*.

(*k*) Game Act, 1831 (1 & 2 Will. 4. c. 32), s. 21.

(*l*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19.

(*m*) Game Act, 1831 (1 & 2 Will. 4, c. 32), ss. 18, 28. There is one statutory exception to this rule: a constable etc. who has seized game that has been unlawfully taken (see p. 238, *ante*) may be directed by the justices to sell the game (Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2). Buying from an unlicensed person is an offence punishable as in note (*f*), *supra* (*ibid.*, s. 28). It has been held in Scotland that the buyer must take the risk if he does not satisfy himself that the seller is a person authorised to sell (*R.* v. *Muirhead* (1887), 51 J. P. 760). Buying game killed abroad from a foreign dealer who has no licence is not an offence (*Guyer* v. *R.* (1889), 23 Q. B. D. 100, *per* Lord COLERIDGE, C.J., and HAWKINS, J., at p. 109). But buying from an unlicensed person in Scotland or Ireland is an offence, since the provisions of the Game Act, 1831 (1 & 2 Will. 4, c. 32), so far as they relate to dealing in game, are extended to the whole of the United Kingdom (Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 13). An offence is committed if birds of game, other than foreign birds, are so purchased when alive, and whether wild or tame; see cases cited in note (*r*), p. 259, *post*.

(*n*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 29.

(*o*) *Ibid.* But the purchase or sale must be such as would have been lawful had it been the act of the licence-holder himself. Where an employee is intrusted with the whole conduct of the business, an unlawful act committed by him would probably render the master liable; compare *Bond* v. *Evans* (1888), 21

SECT. 4. Licences to Deal in Game.

Who may sell to holder of licence to deal in game.

Penalties.

528. The holder of a licence to kill game may sell game to the holder of a licence to deal in game without obtaining such a licence himself (*p*), but if he sells game or offers it for sale to any other person he is liable upon conviction before two justices of the peace to a fine not exceeding £2 for every head of game so sold or offered for sale, together with the costs of the conviction (*q*). No other person may, without a licence to deal in game, sell game or offer it for sale to anyone whatever. Any person who does this renders himself liable upon conviction before two justices to a fine not exceeding £2 for every head of game so sold or offered for sale, together with the costs of the conviction (*r*), and should he assume or pretend to be a person licensed to deal in game, either by affixing a board to his house, shop, or stall, with his name and the words "Licensed to deal in game" on it or by exhibiting any "licence," or by any other device or pretence, he is liable upon conviction before two justices of the peace to a fine not exceeding £10 and the costs of the conviction (*s*).

Issue and form of revenue licence to dealer in game.

529. The revenue licence is issued under the authority of the county council (*t*). The form of the licence is to be such as the Commissioners of Inland Revenue have provided, with such adaptations as are necessary owing to the county council having become the licensing authority (*a*). The licences are to be granted, signed, and issued by such officers of the Post Office as are authorised by the Postmaster-General, at the offices at which the county council shall provide for the issue of licences (*b*).

The licence must denote the amount of duty charged thereon and must contain the proper christian name and surname and place of residence of the person to whom it is granted (*c*).

The licence must be dated on the day when it is actually issued (*d*), and is in force from the actual time of issue (*e*). It may

Q. B. D. 249; unless the master could prove that he was acting contrary to orders (*Newman* v. *Jones* (1886), 17 Q. B. D. 132). But in the case of an employee who was not so intrusted with the conduct of the business committing an unlawful act the master would not be liable; compare *Boyle* v. *Smith*, [1906] 1 K. B. 432; and see titles AGENCY, Vol. I., p. 218; MASTER AND SERVANT.

(*p*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 17. They must, however, hold, not a temporary licence, but the full year's licence, costing £3; see note (*h*), p. 249, *ante*. As to gamekeepers, see p. 242, *ante*.

(*q*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 25.

(*r*) *Ibid.*

(*s*) *Ibid.*, s. 28.

(*t*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16; Order in Council, 19th October, 1903 (Statutory Rules and Orders, p. 470), applying the Finance Act, 1908 (8 Edw. 7, c. 16), s. 6. In county boroughs the licence is granted by the county borough council (Order in Council, *supra*, art. xvii.).

(*a*) This form will continue to be used until an alteration is prescribed by the Treasury. Copies will continue to be printed and provided by the Commissioners of Inland Revenue.

(*b*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16; Order in Council, *supra*, art. iv. The county councils are to provide for the issue of local taxation licences, so that persons may be able to obtain them near their residences (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 20 (5) (a)).

(*c*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 16.

(*d*) *Ibid.*

(*e*) Compare *Campbell* v. *Strangeways* (1877), 3 C. P. D. 105; and note (*l*), p. 249, *ante*.

SECT. 4. Licences to Deal in Game.

be taken out at any time in the year, but at whatever date it is taken out it expires on the 1st July next ensuing (*f*). It is an annual licence and must be renewed annually (*g*).

An applicant for a revenue licence must possess and produce a licence to deal in game, granted by the district council and then in force, as a condition precedent to his application being granted (*h*).

Penalties.

530. The holder of a licence granted by the district council may not deal in game until he has also obtained a revenue licence, and if he does so is liable to a fine of £20 (*i*). A person who attempts to deal in game without having obtained either licence is liable to a fine of £20 for not having a revenue licence, and in proceedings taken to recover the penalty it is sufficient to prove that the defendant dealt in game without a revenue licence (*k*). If a dealer forfeits his licence granted by the district council he is not deprived of his revenue licence, but it is useless to him, as he cannot lawfully continue to deal (*l*).

Scope of licence.

531. The revenue licence is a licence to deal in game generally, not a licence to deal in a particular place. Thus, although a dealer requires a separate licence from the district council for each house, shop, or stall at which he proposes to deal, he does not require more than one revenue licence in respect of all of such places.

Register of licensed dealers in game.

532. A register of the licences granted in each county must be kept by the clerk of the council of such county (*m*). It must contain the name and place of abode of every person to whom a licence has been granted, and must be produced by him for inspection by anyone at all seasonable times upon payment of 1*s.* (*n*).

Animals and birds for which licence required.

533. The animals and birds for dealing in which a licence is required are hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (*o*). No licence is required in the case of rabbits.

A licence is required whether the game dealt in is British (*p*) or

(*f*) Stat. (1839) 2 & 3 Vict. c. 35, s. 4.

(*g*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 14. The duty charged upon it is £2 (*ibid.*, s. 2).

(*h*) *Ibid.*, s. 15.

(*i*) *Ibid.*, s. 14. As to licences granted by district council, see, also, p. 255, *ante*.

(*k*) Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 17. This penalty appears to be in addition to the penalties incurred for dealing in game without a council licence, as to which see note (*f*), p. 256, *ante*.

(*l*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 25; see p. 261, *post*.

(*m*) Order in Council, 19th October, 1908 (Statutory Rules and Orders, p. 470), art. xiv.

(*n*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 15.

(*o*) See definition of "game" (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 2); and p. 208, *ante*.

(*p*) The provisions of the Game Act, 1831 (1 & 2 Will. 4, c. 32), and stat. (1839) 2 & 3 Vict. c. 35, relating to dealing in game, are extended to Scotland and Ireland (Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 13).

imported from foreign countries (*q*), and whether the game is dead or alive (*r*), and whether it is wild or tame (*s*).

Possession after close season.

534. A licensed dealer in game must not buy, sell, or knowingly have in his house, shop, stall, possession, or control any bird of game after the expiration of ten days from the respective days in each year on which it becomes unlawful to kill or take it (*t*).

Penalties.

Should he do so he is liable upon conviction before two justices of the peace to a fine not exceeding £1 for every head of game so bought or sold or found in his house, shop, stall, possession or control, together with the costs of the conviction (*a*).

(*q*) Customs and Inland Revenue Act, 1893 (56 & 57 Vict. c. 7), s. 2. This Act only makes the possession of a revenue licence necessary, but as the possession of a council licence is a condition precedent to obtaining a revenue licence, a dealer in foreign game must possess both. He is, however, only liable to penalties for non-possession of the revenue licence; as to these, see note (*h*), p. 249, *ante*. This provision was enacted to overcome the decision in *Pudney* v. *Eccles*, [1893] 1 Q. B. 52. It does not apply to foreign hares; see p. 260, *post*.

(*r*) *Harnett* v. *Miles* (1884), 48 J. P. 455; *Cook* v. *Trevener*, [1911] 1 K. B. 9; and see *Loome* v. *Baily* (1860), 3 E. & E. 444.

(*s*) *Cook* v. *Trevener*, *supra*.

(*t*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 4. The expression "bird of game" is used so as to exclude hares, for which there is no close time. It includes birds of game killed in Scotland or Ireland; see Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 13; but it does not include foreign game (*Guyer* v. *R.* (1889), 23 Q. B. D. 100). Possession would seem to mean possession by a man on his own behalf; compare *Warneford* v. *Kendall* (1808), 10 East, 19; and see note (*o*), p. 256, *ante*. The ten days are to be calculated by including in the number either the last day of the open season or the day of sale etc., but not both (Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 4); as to the various close seasons, see pp. 209, 210, *ante*.

(*a*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 4. The apparent effect of this provision is to make illegal both the keeping of live game on a game farm and of dead game in cold storage, though the question has not as yet been expressly decided in either case. With respect to the keeping of dead game in cold storage, no distinction is to be observed between the position of persons licensed to deal in game and that of unlicensed persons: but exceptional hardship attaches to the position of the keeper of a game farm owing to the fact that while the right to keep birds in a mew or breeding place is specially reserved by the section in the case of persons not licensed to deal in game, he must necessarily be a licensed dealer in order to sell game to the public (Game Act, 1831 (1 & 2 Will. 4, c. 31), ss. 4, 25; *Harnett* v. *Miles*, *supra*; *Cook* v. *Trevener*, *supra*). It may indeed be argued that the scope of the section is restricted to making illegal the possession of game which, having once been at liberty, is reduced into possession by killing or taking it at some time after the last day on which it could have been lawfully killed or taken; and some authority for this reading of the section as applying to the particular bird kept in possession may be found in the judgment of HAWKINS, J., in *Guyer* v. *R.*, *supra*, at p. 107. After the first ten days of the close season, which would then become a period of grace during which the game in his possession would be presumed to have been lawfully acquired, the keeper of game, whether in cold storage or on a game farm, would have to show either (1) that the birds have never been at liberty so as to be the subject of killing or taking within the meaning of the Game Act (compare *R.* v. *Garnham* (1861), 8 Cox, C. C. 451); or (2) that they were in fact killed or taken at a time when such killing or taking was a lawful act (compare *Simpson* v. *Unwin* (1832), 3 B. & Ad. 134). It should be added, however, that the *dicta* of the judges in *Cook* v. *Trevener*, *supra*, lend no encouragement to this argument, but the point raised here was not then taken, and indeed the only question decided both

SECT. 4. Licences to Deal in Game.

Hares.

535. There is no close season (*b*) for hares, but it is unlawful to sell or expose for sale a hare or leveret between the 1st March to the 31st July (both inclusive), and any person, whether a licensed dealer or not, who does so is liable upon conviction to a penalty not exceeding £1, including the costs of the conviction (*c*). This does not, however, apply to foreign hares imported into Great Britain (*d*).

Penalties for sale or possession.

536. It is unlawful for anyone, whether a licensed dealer or not, to sell or expose for sale or to have in his possession (among other wild birds) snipe, woodcock, plover, wild duck, mallard, teal, or widgeon, after the 15th March and before the 1st August in any year (*e*). The penalty upon conviction before two justices of the peace is not exceeding £1 for every bird in regard to which an offence is committed (*f*). Selling or exposing for sale sand-grouse taken or killed in the United Kingdom at any time in the year is an offence, punishable on conviction before one or more justices by a fine not exceeding £1 for each bird, together with the costs of the conviction (*g*). Rabbits may be sold at any time in the year.

Receiving.

537. Receiving animals, birds, or eggs which are the subject of larceny knowing them to be stolen is an offence for which dealers in game are of course liable as well as others (*h*).

Possession of eggs of game.

538. Any person, whether a licensed dealer or not, who knowingly has in his possession at any time in the year the eggs of any bird of game, swan, wild duck, teal, or widgeon which have been wilfully taken out of the nest on land, by anyone who has not the right of killing the game, nor the permission of the owner of such right, is guilty of an offence (*i*), and is liable upon conviction before two justices to a fine not exceeding 5*s*. for every egg found in his house, shop, possession, or control, together with the costs of the conviction (*k*),

then and in the earlier case of *Harnett* v. *Miles* (1884), 48 J. P. 455, was the illegality of selling game without a licence.

(*b*) *I.e.*, except Sunday or Christmas Day; as to close seasons, generally, see pp. 209, 210, *ante*.

(*c*) Hares Preservation Act, 1892 (55 & 56 Vict. c. 8), s. 2.

(*d*) *I bid.*, s. 3. This does not, apparently, make it an offence to sell hares killed in Ireland—a conclusion supported by the preamble to the Act.

(*e*) Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 3. The date may be varied or extended by a Secretary of State on the application of a county council (*ibid.*, s. 8). It is a valid defence that the killing, if in a place to which the Act extends, was lawful at the time when and by the person by whom (1) the bird was killed, or (2) that the bird was killed at a place to which the Act does not extend (Wild Birds Protection Act, 1881 (44 & 45 Vict. c. 51), s. 1). In the latter case importation from a place to which the Act does not extend is *primâ facie* evidence that it was killed there (*ibid.*). As to wild birds generally, see title ANIMALS, Vol. I., pp. 405 *et seq.*

(*f*) Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 3.

(*g*) Sand-Grouse Protection Act, 1888 (51 & 52 Vict. c. 55), s. 1. This Act, though originally in force for three years only, has been continued; see p. 210, *ante*.

(*h*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91; see title CRIMINAL LAW AND PROCEDURE, Vol IX., pp. 676 *et seq.*

(*i*) Game Act, 1831 (1 & 2 Will 4, c. 32), s. 24.

(*k*) *I bid.* There is no power, however, to seize the eggs (*Stowe* v. *Benstead*, [1909] 2 K. B. 415). A constable cannot seize eggs in the possession of a carrier under powers given by the Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2 (see pp. 235 *et seq.*), and then proceed under the Game Act against the carrier and any person alleged to have induced him to steal the eggs (*Stowe* v. *Benstead*, *supra*).

and if he is a licensed dealer the licence granted to him by the district council is thereby forfeited (*l*).

Liabilities of licensed dealer in game.

539. A licensed dealer in game, who takes or kills game without a licence to do so (*m*), or who kills or takes game in close time (*n*), or who lays down poison for game (*o*), or who trespasses upon land in the daytime in search of game (*p*), or who, being the occupier of land on which the right of taking and killing the game is reserved, either takes or kills it himself (*q*), or permits another to do so (*r*), not only renders himself liable to the appropriate penalty for each offence, but forfeits the licence granted to him by the district council to deal in game (*s*).

Unlicensed persons buying game.

540. Persons who are not themselves licensed dealers in game may not buy game from anyone but a licensed dealer. Should they do so they are liable upon conviction before two justices of the peace to a fine not exceeding £5 for every head of game bought, together with the costs of the conviction (*t*).

Selling or offering to sell without licence.

Persons who hold neither a licence to kill game nor a licence to deal in game may not sell nor offer to sell game to anyone; and should they do so they are liable upon conviction before two justices of the peace to a fine not exceeding £2 for every head of game sold or offered for sale, together with the costs of the conviction (*u*).

A person who is not licensed to deal in game, but has a licence to kill game, may not sell to anyone but a licensed dealer, and, if he does so, is liable to the same penalty as persons who have no licence either to kill or to deal in game (*a*).

Sale by holder of full licence to kill game.

The holder of a full licence (*b*) to kill game may sell game to a licensed dealer (*c*), but with respect to birds of game he must not sell even to a licensed dealer, after the expiration of ten days from the day in the year at which it would have become unlawful to kill or take them, under a penalty not exceeding £1 for each head of game sold, together with the costs of the conviction (*d*).

(*l*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 22.
(*m*) *Ibid.*, s. 23.
(*n*) *Ibid.*, s. 3.
(*o*) *Ibid.*
(*p*) *Ibid.*, s. 30.
(*q*) *Ibid.*, s. 12.
(*r*) *Ibid.*, s. 30.
(*s*) *Ibid.*, s. 22.
(*t*) *Ibid.*, s. 27. If they have bought *bonâ fide* from one who purported to be a licensed dealer they are excused (*ibid.*); but the onus of proving that they did so rests on them (*ibid.*, s. 42).
(*u*) *Ibid.*, s. 25. This does not apply to an innkeeper selling game for consumption in his house (*ibid.*, s. 26) (see note (*t*), p. 255, *ante*), nor to a constable directed by justices to sell game which he has seized as having been unlawfully taken (Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2).
(*a*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 25.
(*b*) That is, a licence for the full year, costing £3; see note (*h*), p. 249, *ante*. As to gamekeepers, see pp. 241 *et seq.*, *ante*.
(*c*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 17.
(*d*) *Ibid.*, s. 4. The ten days are to be calculated by including either the last day at which killing would have been lawful or the day of sale, but not both; and compare notes (*t*) and (*a*), p. 259, *ante*.

SECT. 4. Licences to Deal in Game.

Possession during close season.

541. Persons who are not licensed dealers in game, whether they hold a licence to kill game or not, may neither buy nor sell, nor knowingly have in their house, possession, or control, any bird of game after forty days from the day in the year on which it would have become unlawful to kill or take it. The penalty upon conviction before two justices of the peace is a sum not exceeding £1 for every head of game in regard to which an offence is committed, together with the costs of the conviction (*e*).

This provision, however, does not apply to birds of game kept in a mew or breeding place (*f*).

Part VIII.—Deer.

Deer.

542. There is no statutory definition of deer, but in those statutes which mention deer the term appears to include every variety of deer of either sex and of all ages (*g*). Although deer are not "game," a game licence is required for taking or killing them (*h*) otherwise than by hunting with hounds (*i*), except in inclosed lands where they may be pursued and killed by the owner or occupier or by any person directed or permitted by him to do so (*k*). There is no statutory close time for deer in England, but deer are included in the term "game" for the special purpose of compensation for damage done by game to crops (*l*).

Tame deer.

543. Tame deer are personal property (*m*) and the subject of larceny at common law.

Whether they are tame or not is a matter to be decided upon the facts of each case; but the presumption is in favour of their being so when they are kept in a park for ornament or profit rather than for sport (*n*).

Wild deer.

544. Wild deer are not the subject of larceny at common law, but they are specially protected by statute.

Offences.

It is an offence unlawfully and wilfully to course, hunt, snare, carry away, kill, or wound them in an uninclosed part of a forest,

(*e*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 4; see note (*d*), p. 261, and note (*a*), p. 259, *ante*.

(*f*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 4. Birds so kept need not be kept in the same place throughout the close season (*Jenner* v. *Gorringe* (1879), 43 J. P. 781); see note (*a*), p. 259, *ante*.

(*g*) *R.* v. *Strange* (1843), 1 Cox, C. C. 58.

(*h*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 2. Any person assisting the taking or killing requires a licence, unless he is assisting a duly licensed person (*ibid.*, s. 5, Exemption 3). As to the mode of obtaining a licence and penalties for acting without a licence, see pp. 246 *et seq.*, *ante*. No licence is required for dealing in deer; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 475, as to fence months etc.

(*i*) Game Licences Act, 1860 (23 & 24 Vict. c. 90) s. 5, Exception 4.

(*k*) *Ibid.*, s. 5, Exception 5. If a gun be used a gun licence will be required; see p. 251, *ante*.

(*l*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 10.

(*m*) *Morgan* v. *Abergavenny* (*Earl*) (1849), 8 C. B. 768; *Ford* v. *Tynte* (1861), 2 John. & H. 150; *Davis* v. *Powell* (1738), 7 Mod. Rep. 249.

(*n*) *Ibid.*

chase, or purlieu (*o*). On a first offence the offender is to be brought before a court of summary jurisdiction and to be fined a sum not exceeding £50 (*p*). A second or subsequent offence is a felony, and renders the offender liable to imprisonment for a term not exceeding two years with or without hard labour, and if a male under sixteen to a whipping (*q*).

A like offence committed where the deer are in the inclosed part of a forest, chase, or purlieu, or in any inclosed land where deer are usually kept, is, whether committed for a first time or not, a felony, and renders the offender liable to a like penalty (*r*).

Authority of deerkeepers or assistants.

545. Deerkeepers or their assistants are authorised to demand, from persons who, for the purpose of committing any such offence, enter any forest, chase, or purlieu, whether inclosed or not, or any inclosed place where deer are usually kept, the delivery of any gun, firearm, snare, or engine in their possession and any dog brought for the purpose of hunting, coursing, or killing the deer (*s*). If the subjects of the demand are not immediately delivered up, the deerkeepers or their assistants are authorised to seize them from the offenders in the forest, chase, or purlieu itself, or in case of pursuit in any place to which they may escape, for the use of the owner of the deer (*t*).

Assaulting deerkeeper or assistant.

Any such offender who unlawfully beats or wounds a deerkeeper or any of his assistants when acting in pursuance of their statutory powers commits a felony, and is liable to imprisonment for a term not exceeding two years with or without hard labour, and if a male under sixteen to a whipping (*a*).

Setting snares or engines.

546. Persons who unlawfully and wilfully set snares or engines to take or kill deer in any part of a forest, chase, or purlieu, whether

(*o*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 12. To attempt to kill or wound is also an offence (*ibid.*). But the killing outside the forest etc. of a deer which is usually kept within it, but which happens to be outside, is not an offence against this section (*Threlkeld* v. *Smith*, [1901] 2 K. B. 531).

(*p*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 12. One justice may hear the case (*ibid.*), but in that event the maximum fine is £1 (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (7)); and see note (*g*), p. 229, *ante*.

(*q*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 12. If the offender has previously done any act relating to deer punishable by a fine under this or any previous statute, the commission of this offence is to be deemed a second offence (*ibid.*); but where, upon an indictment for a second offence setting out a previous conviction, it appears that the previous conviction was invalid the prisoner cannot be convicted on that indictment (*R.* v. *Allen* (1823), Russ. & Ry. 513, C. C. R.; compare *R.* v. *King* (1843), 1 Dow. & L. 721).

(*r*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 13. A ditch and bank sufficient to keep out cattle, but over which deer could pass, has been held to constitute an inclosure (*R.* v. *Money* (1847), 2 Russell on Crimes and Misdemeanours, 7th ed., p. 1328).

(*s*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 16. The assistants are entitled to act whether in the presence of the deerkeeper or not (*ibid.*).

(*t*) *Ibid.* But the keeper must demand delivery before seizing the offender to take the gun etc. from him; see *R.* v. *Amey* (1823), Russ. & Ry. 500, C. C. R. "Engine" means something *ejusdem generis* with snare; see p. 236, *ante*.

(*a*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 16; but it seems that the keeper must at the time be attempting to seize the gun etc. (compare *R.* v. *Doddridge* (1860), 8 Cox, C. C. 335), and beating or wounding means doing so literally. A

PART VIII. Deer.

inclosed or not, or on fences or banks at the boundaries thereof or in inclosed land where deer are usually kept, or who unlawfully and wilfully destroy the fences of land where deer are actually kept, commit an offence for which they are liable on summary conviction to a penalty not exceeding £20 (*b*).

Possession of deer.

The possession by any person who cannot satisfactorily account therefor of any deer, or the head, skin, or other part thereof, or of any snare or engine for the taking of deer, renders such person liable upon summary conviction to a penalty not exceeding £20 (*c*).

If in such case the person charged is not liable to conviction, the court may in its discretion summon before it every person through whose hands the deer or the part thereof has passed and inflict the above penalty upon the person from whom the same shall have been first received if he cannot satisfactorily account for his possession of it (*d*).

technical assault, *e.g.*, where the offender held a keeper down while his companion escaped, would not be within the section (*R.* v. *Hale* (1846), 2 Car. & Kir. 326).

(*b*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 15.

(*c*) *Ibid.*, s. 14. But if the person charged can show that he came into possession of the deer in a manner which was not unlawful within the meaning of s. 12 or s. 13 (*ibid.*), he cannot be convicted of an offence under s. 14 (*ibid.*) (*Threlkeld* v. *Smith*, [1901] 2 K. B. 531).

(*d*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 14. This provision does not extend to the possession of a snare or engine for taking deer.

GAME LAWS.

See GAME.

GAMING AND WAGERING.

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Part I.—Wagering Contracts.

SECT. 1.—*In General.*

Distinction between gaming contracts and wagers.

547. The term "gaming," strictly used, means playing a game for stakes hazarded by the players. That is what is intended when the offence of gaming is spoken of. The mutual promises which the players necessarily make, expressly or by implication, in playing for a stake, as to its transfer upon the result of the game, form a gaming contract, which is itself a wager. The term is also used, though perhaps less strictly, to express the operations of those who, not being themselves players, wager upon the sides or hands of those who play, and the wagers thus made are also called "gaming contracts."

It thus appears that, while all gaming contracts are wagers, the term "gaming contract" includes only those wagers which are conditioned upon the result of sports or pastimes. The term "wager" is, however, often used in contradistinction to, and as excluding, gaming contracts.

Importance of the distinction.

548. Since 1845, when all contracts by way of gaming and wagering were made void, the distinction between wagers and gaming contracts has not been of importance between the immediate parties to them, but it remains material in considering the effect of certain remoter transactions founded upon or connected with such contracts.

The invalidity which the common law imposes upon certain wagers as contravening the policy of the law (*a*) need no longer be considered, for though such wagers are often spoken of as illegal, their illegality is not of a kind which affects remoter transactions (*b*).

(*a*) *E.g.*, a wager upon the sex of a third person (*Da Costa* v. *Jones* (1778), 2 Cowp. 729); that Napoleon would be assassinated by a certain day (*Gilbert* v. *Sykes* (1812), 16 East, 150); upon the conviction or acquittal of a prisoner (*Evans* v. *Jones* (1839), 5 M. & W. 77); upon the amount to be realised by the hop duties in a particular year (*Atherfold* v. *Beard* (1788), 2 Term Rep. 610).

(*b*) *Fitch* v. *Jones* (1855), 5 E. & B. 238; and see p. 280, *post*.

SECT. 2.—*Nature of the Contract.*

SECT. 2. Nature of the Contract.

549. A wagering contract has been described as one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of such event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake which he will so win or lose, there being no other real consideration for the making of such contract by either of the parties (*c*). Definition of a wagering contract.

550. A wagering contract does not differ from any other in respect of the number of parties. There may be two or more, and each may consist of several persons. Thus, several persons may bet together on their respective chances of success in a race in which they are competitors, the losers to forfeit their stakes to the winner. Such are the conditions of an ordinary sweepstake (*d*). A competition for a prize subscribed for by the competitors is a wager and nothing more (*e*). The parties.

551. The statement that the parties to a wager must profess opposite views must not be understood in the sense that either party must or does avow to the other that he holds a particular opinion upon the event in question. In an ordinary horse race, a man who simply accepts the odds offered, and says no more than that he does so, unquestionably makes a bet. He may even be betting against what he believes the issue will be, and avow the fact (*f*), but it is none the less a bet. These considerations would seem to exclude the necessity for any avowal. But if the profession of the parties is only an inference from the contract itself, such an The profession of opposite views.

(*c*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, *per* HAWKINS, J., at p. 490; affirmed, [1893] 1 Q. B. 256, C. A. The passage which follows that which is quoted deals with the necessity for mutuality. This necessity is not peculiar to wagers, but is common to all contracts, and is therefore not discussed; see title CONTRACT, Vol. VII., p. 354. The passage cited should perhaps be described rather as a comprehensive description of a wager than as a definition. It was, of course, pronounced with reference to the facts which were under discussion, and therefore should not be criticised for failing to cover every conceivable instance of the thing defined, or for covering more than was intended. But from its very comprehensiveness it may mislead inquirers into supposing that it is sufficient and accurate for all purposes, and it is for this reason, and in no spirit of criticism, that some analysis of its component parts is offered.

(*d*) A sweepstake in which the winner is determined by lot or chance is a lottery (*Allport* v. *Nutt* (1845), 1 C. B. 974; *Gatty* v. *Field* (1846), 9 Q. B. 431; and see p. 299, *post*).

(*e*) Compare *Diggle* v. *Higgs* (1877), 2 Ex. D. 422, C. A.; *Lockwood* v. *Cooper*, [1903] 2 K. B. 428; and see the distinction drawn in *Applegarth* v. *Colley* (1842), 10 M. & W. 723, between money subscribed by competitors and added money. The proviso to s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), deals with subscriptions to lawful games. This matter is dealt with hereafter (see p. 272, *post*).

(*f*) *E.g.*, a man who has betted upon a horse which he believes will win a valuable race may yet also bet against it to secure himself against loss in either event (see *Greville* v. *Chapman* (1844), 5 Q. B. 731).

SECT. 2. **Nature of the Contract.**

inference is not, it is submitted, the true one, or at any rate of much value in determining the attributes of a wager. No doubt, each party forms or adopts an opinion upon the value of the chances of an issue in his favour; this is expressed in the odds. But it is a matter of agreement, not of difference. That which the parties do differ upon is their hope, expectation, or, possibly, opinion, that the issue will belie the odds. In that expectation the contract gives each party an interest in the event which he would not otherwise have, and to acquire such an interest is the whole object of the parties in entering into the contract; and if neither of the parties has any interest in the event save the hope or expectation created by the contract, the contract is a wager (*g*). The statement, therefore, that the parties profess opposite views seems to amount to an expression of their motives in entering into the contract, and does not differ in intention from the statement dealing with their interest in the stake.

The stake.

552. The stake of each party is that which is at hazard between them, and may be said to quantify the whole interest of either party in the event (*h*). If either party has, before entering into the contract, such an interest in the event as the law considers an insurable interest (*i*), the term "stake," as it is used in the definition which has been used (*j*), is not properly applicable. It is with the transfer of the stake that the parties are concerned, and solely concerned, or, as it is expressed in the definition, "there being no other real consideration for the making of such contract by either of the parties" than the stake.

The transfer of the stake must be from one party to the other; for it is essential to a wagering contract that under it each party may either win or lose (*k*). If the possibility of loss to one

(*g*) See *Kent* v. *Bird* (1777), 1 Cowp. 583. Hence policies of insurance made without insurable interest are wagers. See note (*h*), *infra*, and title INSURANCE. No doubt in the case of a "hedging" bet, the party making it has another interest in the event, *e.g.*, a competitor who risks a stake and has the chance of winning a prize, or of winning or losing some former bet on the same event. But these interests themselves arise out of wagers, and the interest in question must be independent of any wager.

(*h*) It is submitted that the gambling element in a wager is not to be sought in the incidents of the contract itself, but in the motives of the parties for entering into it. A comparison of an insurance contract and a wager will make this evident. Any contract of insurance can be put into the form of a wager, and yet the presence of an insurable interest in one of the parties will prevent its being so. But it is obvious that the presence or absence of such an interest in the event cannot alter the undertakings of the parties, which remain the same whether they are enforceable or not. In other words, something which is antecedent to and independent of the contract is allowed to operate upon its effect. It is submitted that that which is allowed to have this operation is the motive of the parties in entering into it. While in a wager the motive is the hope of gain, in an insurance the motive of one party is the fear of loss. And, inasmuch as real motives are too obscure for judicial inquiry, the presence or absence of an insurable interest supplies a working test by means of which they are to be gauged.

(*i*) See title INSURANCE.

(*j*) See p. 267, *ante*.

(*k*) *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685, C. A.; *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; affirmed, [1893] 1 Q. B. 256, C. A.; *Lockwood* v. *Cooper*, [1903] 2 K. B. 428; and see *Roberts* v. *Harrison* (1909), 101 L. T. 540,

party or the other, not loss in the conventional sense of failure to win, but in the sense of an actual payment or performance for the benefit of the other party, is absent, there is no stake, and the transaction is not a wager (*l*).

The event.

553. The parties to a wager select alternative contingencies upon the happening of which each will perform his promise. The happening of one of these contingencies is the event, which is, therefore, future and uncertain (*m*).

where a person who successfully manipulated a machine had the prospect, at best, of winning the privilege of manipulating it again without further payment, and DARLING, J., was of opinion that the transaction was a wager. The case was, however, decided on other grounds; see note (*x*), p. 288, *post*.

(*l*) Thus, where the defendants offered £100 to any person who, after conforming to certain conditions specified in their offer, one of which was the purchase of an appliance of which they were the proprietors, should contract influenza, it was contended that the transaction was a wager, but held that it was not, inasmuch as when the contract first came into existence (*i.e.*, when the plaintiff had performed the conditions which were the consideration for the defendant's promise) in no event could the plaintiff lose anything, nor could the defendants win anything. It was in fact a conditional bargain (*Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; affirmed, [1893] 1 Q. B. 256, C. A.). But if this reasoning were pushed to its logical conclusion, it would seem to show that a contract in which the performance of one party was the consideration for the promise of the other could never be a wager. It is submitted that the decision that the transaction in question was not a wager is preferably to be supported upon the ground that the true inference from the facts was that the real motive of the parties in entering into the contract was not the transfer of the £100, but the sale and purchase of an article in the ordinary course of trade. In this view the £100 was not a stake. See also note (*h*), p. 268, *ante;* and compare the cases on "coupon competitions," where the question is whether the obtaining of the newspaper, or the conditional promise of a prize, is the inducement to the purchaser, when both elements combine to form the consideration. The courts have drawn different inferences from similar facts (*Caminada* v. *Hulton* (1891), 60 L. J. (M. C.) 116; *R.* v. *Stoddart*, [1901] 1 K. B. 177, C. C. R.; *Hawke* v. *Hulton & Co.* (1905), 22 T. L. R. 169; *Stoddart* v. *Sagar*, *Sagar* v. *Stoddart*, [1895] 2 Q. B. 474). The judgment in *Carlill* v. *Carbolic Smoke Ball Co.*, *supra*, however, affirms the principle that the absence of reciprocal risk of loss precludes a contract from being a wager. A contract of suretyship may be distinguished in the same way, for if the principal debtor does not make default, the surety will lose nothing and the creditor win nothing from him. But in *Richards* v. *Starck*, [1911] 1 K. B. 296, the defendant had invited persons to contribute to a "trust" he was about to open in certain stocks, and promised that if no profit was made the contributions should be returned in full. If there was a profit, it was to be divided among the contributors, less 10 per cent. The plaintiff contributed, and on a profit being made sued the defendant for his share. It was held that the contract was "by way of wagering," and that the plaintiff could not recover. Compare *Hirst* v. *Williams and Perryman* (1895), 12 T. L. R. 128, C. A., a contrary decision on similar facts.

(*m*) Inasmuch as the nature of the event has an important bearing upon the effect, not of the wager itself, but of remoter transactions arising out of it, it is often necessary to ascertain accurately what is the particular contingency upon which payment is made to depend. In a loose sense a bet may be upon a past event—for instance, whether a particular horse won a race in a certain year. In such a case the parties are betting upon the accuracy of their information or memory; and the "event" is the proof that one or other was accurate. A security for the performance of such a bet would be without consideration, whereas if the event had been the race itself, the security would have been given for an illegal consideration; compare *Good* v. *Elliott* (1790), 3 Term Rep. 693; *Pugh* v. *Jenkins* (1841), 1 Q. B. 631.

SECT. 2. **Nature of the Contract.**

Substance, not form.

554. As in the case of any other contract, so in a wager, the intention of the parties is a question of fact, and the court will look beyond the form in which the parties have couched the transaction in order to ascertain it (*n*). When the contract is good in form there may yet be annexed to it a stipulation that it shall not be executed according to its terms, and this is an important test for determining whether the transaction is real or colourable (*o*). Such a stipulation may either operate to defeat some of the expressed terms (*p*), or may add a term which would give the transaction a different complexion (*q*). But though there be no annexed stipulation, and though the terms of the contract provide for a perfectly legitimate object, as the sale of goods or the supply of information, yet if to that object there has been superadded an element of wagering, it is a question whether the original object has not been made merely an incident in the wager contract, or whether the element of wagering is severable from the rest of the contract (*r*). A test of this, when the contract is in form a sale of goods or chattels at one price or another, according as the happening of a named event shall determine, would seem to be whether the happening of the event does in fact tend to make the value of the article approximate to the price agreed in that event to be paid (*s*), thus distinguishing a sale at the market price of a future day, or at a price formerly given for a similar article, and a sale at a price fixed by relation to an event which has no real bearing upon the value (*t*).

Where there is a present price agreed, though the value of the article is unascertained at the time the contract for its sale is made, the transaction is not a wager (*a*).

Though the element of wagering be present in a transaction, yet if the contract be not mainly dependent upon, and is severable

(*n*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; affirmed, [1893] 1 Q. B. 256, C. A.

(*o*) *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685, C. A.; *Grizewood* v. *Blane* (1851), 11 C. B. 526; *Shaw* v. *Caledonian Rail. Co.* (1890), 17 R. (Ct. of Sess.) 466, 475; *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166.

(*p*) *Universal Stock Exchange* v. *Strachan*, *supra*.

(*q*) *Hill* v. *Fox* (1859), 4 H. & N. 359, Ex. Ch. To a contract for the loan of money on the security of a mortgage may be annexed a stipulation that a wager lost in favour of the lender shall be repaid out of the proceeds of the loan, in which case the mortgage would be intended to secure the money lost, and not the money lent only, and would be given for a void or illegal consideration. The question properly left to the jury, in such a case, is whether there was such a stipulation.

(*r*) *Rourke* v. *Short* (1856), 5 E. & B. 904; *Higginson* v. *Simpson* (1877), 2 C. P. D. 76; and compare *Caminada* v. *Hulton* (1891), 60 L. J. (M. C.) 116, as distinguished in *R.* v. *Stoddart*, [1901] 1 K. B. 177, C. C. R.

(*s*) *Rourke* v. *Short*, *supra*; and compare *Crofton* v. *Colgan* (1859), 10 I. C. L. R. 133.

(*t*) *Brogden* v. *Marriott* (1836), 3 Bing. (N. C.) 88; where the contract was for the sale of a horse for £200 if he trotted eighteen miles in an hour, and for 1*s*. if he did not. He failed to do so, so the price became 1*s*. But the horse's failure to accomplish the task by never so little, though tending perhaps to decrease its value, did not make it approximate to the price, namely, a nominal one.

(*a*) The sale of next year's apple crop; of the next haul of a fisherman's net; of an undeclared dividend, afford instances. See also *Thacker* v. *Hardy*, *supra*; *Marten* v. *Gibbon* (1875), 33 L. T. 561, C. A.

from, the wager, this element may be severed and the contract enforced without it (*b*).

SECT. 2. Nature of the Contract.

SECT. 3.—*Rights of the Parties to the Contract.*

SUB-SECT. 1.—*Inter se.*

All wagers void.

555. All contracts by way of gaming or wagering (*c*) are void (*d*), and no action can be brought by the winner of a wager either against the loser or the stakeholder to recover what is alleged to be won (*e*). This applies both to wagers upon games and to those upon other events (*f*). All alike are void, and, though not illegal (*g*), are of a neutral character, giving rise neither to rights nor liabilities (*h*).

Fresh promise for new consideration.

556. But if there is a fresh promise of payment by the loser for a fresh consideration from the winner, the contract so formed is not one by way of gaming or wagering; the consideration is good, and the fresh promise of payment is enforceable (*i*). Mere forbearance to sue at the debtor's request is, however, not sufficient consideration (*k*).

(*b*) *Wilson* v. *Cole* (1877), 36 L. T. 703; and see the judgment of CROMPTON, J., in *Rourke* v. *Short* (1856), 5 E. & B. 904.

(*c*) The expression "contracts by way of gaming and wagering" seems to include contracts which are not themselves strictly wagers, but are so intimately related to wagers as to be inseparable from them (*Higginson* v. *Simpson* (1877), 2 C. P. D. 76; *Thomas* v. *Smith* (1901), 18 T. L. R. 69; *Rourke* v. *Short*, *supra*. In the last case CROMPTON, J., expressed a doubt whether a transaction which merely in part depended on a wager would be void. It is probably a question of how far the wagering element enters into the transaction under discussion).

(*d*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18. A wager cannot be enforced indirectly. Where the wager provides that it shall be P. P.—"play or pay"—that is, that the party refusing to compete shall forfeit his stake to the other, no action can be brought to recover the forfeit (*Daintree* v. *Hutchinson* (1842), 10 M. & W. 85, where the wager was illegal, but this fact would not, it is submitted, affect the principle).

(*e*) *Diggle* v. *Higgs* (1877), 2 Ex. D. 422, C. A. As regards pleading the Gaming Acts as a defence to an action, see *Luckett* v. *Wood* (1908), 24 T. L. R. 617, where it was held that a court would of its own motion refuse to allow the law being invoked to enforce payment of a bet. The fact that a defendant has pleaded the Gaming Acts as a defence is not a ground for depriving him of costs (*Granville & Co.* v. *Firth* (1903), 88 L. T. 9, C. A.). As to pleading, in general, see title PLEADING.

(*f*) The earlier Gaming Acts, stat. (1664), 16 Car. 2, c. 7 (now repealed); Gaming Act, 1710 (9 Anne, c. 19); and Gaming Act, 1835 (5 & 6 Will. 4, c. 41), refer only to wagers on games.

(*g*) *I.e.*, by virtue of the Gaming Act, 1845 (8 & 9 Vict. c. 109); but they may for other reasons be illegal.

(*h*) *Haigh* v. *Sheffield Town Council* (1874), L. R. 10 Q. B. 102, *per* LUSH, J.

(*i*) *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., and cases there cited. Compare *Genforsikrings Aktieselskabet* (*Skandinavia Reinsurance Co. of Copenhagen*) v. *Da Costa*, [1911] 1 K. B. 137, 142. The facts were held to establish such a new contract in *Bubb* v. *Yelverton* (1870), L. R. 9 Eq. 471; *Goodson* v. *Baker* (1908), 98 L. T. 415 (but see the comments on this case in *Hyams* v. *Stuart King*, *supra*); *Re Browne*, *Ex parte Martingell*, [1904] 2 K. B. 133; *Hodgkins* v. *Simpson* (1908), 25 T. L. R. 53; *Cohen & Co.* v. *Ulph & Co.* (1909), 25 T. L. R. 710; affirmed, 26 T. L. R. 128, C. A.; and *Wilson* v. *Conolly* (1910), 27 T. L. R. 7; affirmed (1911), 130 L. T. Jo. 337, C. A.; but the facts did not establish such a fresh contract in *Chapman* v. *Franklin* (1905), 21 T. L. R. 515, and *Ladbroke & Co.* v. *Buckland* (1908), 25 T. L. R. 55.

(*k*) *Chapman* v. *Franklin*, *supra*; *Hyams* v. *Stuart King*, *supra*, *per* GORELL BARNES, P., at p. 708; *Hay* v. *Ayling* (1851), 16 Q. B. 423. See also title CONTRACT, Vol. VII., p. 397.

SECT. 3. Rights of the Parties to the Contract.

Prizes.

557. An action, however, lies to recover any prize or subscription to a prize to be awarded to the winner of any lawful game, sport or pastime (*l*), provided that the subscription or prize is not itself a stake, and the competition, therefore, a wager (*m*). It has not been decided whether, or how far, a prize provided partly by the stakes and partly by contributions from persons who are not competitors, can be recovered by the winner (*n*).

Money paid in respect of a wager.

558. If the loser has paid his stake to the winner after the event, it cannot be recovered, even though the wager is illegal (*o*). On the other hand, when a stake is paid to, or rather deposited with, one party by the other before the event, it is recoverable either before or after the event, unless and until it has been appropriated by the winner in payment (*p*). But when the deposit is made in respect of a bet upon a horse race or other sport or game, and is received by or on behalf of the owner or occupier of, or, perhaps, of the person using (*q*), a

(*l*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18. As to what are lawful or unlawful games, see p. 284, *post*.

(*m*) *Diggle* v. *Higgs* (1877), 2 Ex. D. 422, C. A.; and compare *Applegarth* v. *Colley* (1842), 10 M. & W. 723; *Lockwood* v. *Cooper*, [1903] 2 K. B. 428; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497, C. A. See also p. 267, *ante*.

(*n*) The reported decisions upon the meaning of the proviso in favour of prizes have all been given in cases where the alleged prizes were the stakes of the parties and the transactions were wagers (*Batson* v. *Newman* (1876), 1 C. P. D. 573, C. A.; *Coombes* v. *Dibble* (1866), L. R. 1 Exch. 248; *Diggle* v. *Higgs*, *supra*). If, therefore, the limitation put upon the proviso by those decisions is used only in reference to the facts under discussion, it would exclude from the operation of the proviso only prizes or subscriptions which are stakes and nothing more. Therefore, without questioning the correctness of the decision in *Diggle* v. *Higgs*, *supra*, as applicable to that state of facts, it is still arguable that the proviso, though not intended to make the stakes in a mere wager recoverable under the guise of a prize, was intended to exclude from the operation of the section what are substantially prizes, though in part stakes. Perhaps, if it were possible to do so, the courts would sever the prize, allowing only the contributions of non-competitors to be recovered; see p. 270, *ante*; and compare *Wilson* v. *Cole* (1877), 36 L. T. 703, and the judgment of CROMPTON, J., in *Rourke* v. *Short* (1856), 5 E. & B. 904.

(*o*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1. It was formerly held that money paid in respect of a bond which was void under the Gaming Act, 1710 (9 Ann. c. 14), s. 1, might be recovered even after the event (*Rawden* v. *Shadwell* (1755), Amb. 269), but it is submitted that the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, though passed *alio intuitu*, has the effect stated in the text; compare *Saffery* v. *Mayer*, [1901] 1 K. B. 11, C. A. See, however, *Gasson* v. *Cole* (1910), 26 T. L. R. 468, where the learned judge seems to have taken the view that the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, applied only where the person seeking to recover was an agent.

(*p*) *Tappenden* v. *Randall* (1801), 2 Bos. & P. 467; and see p. 275, *post*. The statement in the text assumes that a party to a wager who receives a deposit from the other is in the position of stakeholder. See, however, the observations of Lord ESHER, M.R., in *Strachan* v. *Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697, C. A., at p. 699. It will be observed that, in view of the finding that there had been appropriation by the winner, these observations go beyond what was necessary for the decision of the case. It is difficult to distinguish logically between the position of a party with whom the stake of the other party is deposited, and that of a third party who holds both stakes. The judgment of A. L. SMITH, L.J. (*ibid.*, at p. 703), draws no such distinction; and see *Manning* v. *Purcell* (1855), 7 De G. M. & G. 55, C. A.; *Re Cronmire*, *Ex parte Waud*, [1898] 2 Q. B. 383, C. A.; *Aubert* v. *Walsh* (1810), 3 Taunt. 277.

(*q*) The doubt arises on the words of the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 5; see note (*r*), p. 273, *post*.

house, office, room, or other place, kept or used for the purpose of betting with persons resorting thereto or of receiving deposits on such bets, the deposit may be recovered although it has been appropriated by the winner (*r*).

SUB-SECT. 2.—*Against the Stakeholder.*

Stakeholder position.

559. The stakeholder is the agent of each depositor in respect of the sum deposited by him, having authority to pay such deposit to the winner, and is not the agent or trustee of both parties (*s*). He cannot, therefore, sue either party for an unpaid stake (*t*).

Stakeholder's liability for stakes.

560. Although, after the event, by reason of the stakeholder's authority from the loser, the loser's stake is held to the use of the winner, yet the winner is precluded from bringing an action against the stakeholder for its recovery (*a*). An action can, however, be brought against a stakeholder by either party to recover his own stake, even after the determination of the event upon which the wager was made (*b*), as long as the stakeholder has not executed the authority given to him by paying the loser's stake to the winner (*c*); and this is so whether the wager be void

(*r*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 5: "Any money or valuable thing received by *any such person aforesaid* as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement, as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction." Although the section speaks of a deposit on *any* bet, a consideration of the earlier sections will show that the bets in question are only those on races, games, fights, and other sporting contingencies (see p. 294, *post*). The liability, under this section, of a "person using" (as to the kind of use intended, see p. 295, *post*) a house, room, or place, for the prohibited purposes, presents some difficulty. It arises upon the words printed above in italics. Ss. 1 and 3 of the Betting Act, 1853 (16 & 17 Vict. c. 119), mention, among other persons, "persons using" the house etc., while s. 4 (*ibid.*), which imposes a penalty upon receiving deposits, does not impose it on the "person using." In *Doggett* v. *Cattern* (1865), 11 Jur. (N.S.) 243, Ex. Ch., CROMPTON, J., CHANNELL, B., BLACKBURN, J., and (*semble*) POLLOCK, C.B., were of opinion that s. 5 of the Betting Act, 1853 (16 & 17 Vict. c. 119), referred only to the persons mentioned in s. 4 (*ibid.*), while BRAMWELL, B., MELLOR, J., and PIGGOTT, B., expressly left this point open. But in *Vogt* v. *Mortimer* (1906), 22 T. L. R. 763, JOYCE, J., held that s. 5 of the Betting Act, 1853 (16 & 17 Vict. c. 119) applied to a "person using" the place in question. The earlier case was not cited. It should, however, be borne in mind that the term "person using" had not, when *Doggett* v. *Cattern*, *supra*, was decided, the limited meaning now assigned to it. See note (*b*), p. 275, *post*.

(*s*) *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189.

(*t*) *Charlton* v. *Hill* (1831), 5 C. & P. 147.

(*a*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18.

(*b*) *Varney* v. *Hickman* (1847), 5 C. B. 271; *Martin* v. *Hewson* (1855), 10 Exch. 737; *Hampden* v. *Walsh*, *supra*; *Diggle* v. *Higgs* (1877), 2 Ex. D. 422, C. A.; *Trimble* v. *Hill* (1879), 5 App. Cas. 342, P. C.; *Re Cronmire*, *Ex parte Waud*, [1898] 2 Q. B. 383, C. A. There are, however, two cases (*Weller* v. *Deakins* (1827), 2 C. & P. 618; and *Goldsmith* v. *Martin* (1842), 4 Man. & G. 5) in which the owner of the horse which finished first, knowing the horse to be disqualified, failed to recover his own stake.

(*c*) The words of the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, "no suit shall be brought to recover any sum of money . . . deposited in the hands of any person to abide the event," do not apply to the party's own stake (*Diggle* v. *Higgs*, *supra*). Nor is a party's own stake, when deposited with a stakeholder, "paid" by him "under or in respect of" a wager within the meaning of the

SECT. 3. Rights of the Parties to the Contract.

only (*d*) or also illegal (*e*). But when the stakeholder has paid over the stake in accordance with a subsisting authority, no action can be brought against him (*f*), even though the wager be illegal (*g*). If, however, he pays the winner after the loser has determined his authority to do so, the stakeholder is liable for the amount paid (*h*). So also if he does not pay strictly in accordance with his mandate, which he does not do unless the party to whom he pays has been declared the winner in accordance with the conditions of the wager (*i*), and he cannot waive any of the conditions without the consent of the parties (*k*).

Revocation of authority.

561. An intimation from a party that he does not intend to abide by the wager, a demand for the return of his own stake (*l*), or, it seems, a demand for both stakes on the ground that he is the winner, are sufficient to determine the stakeholder's authority to pay the stake of that party to the winner (*m*), and thereupon any money in the hands of the stakeholder ceases to be money deposited to abide the event, and becomes money held to the use of the depositor, which the stakeholder has no good reason for retaining (*n*); while, apart from express revocation, the stakeholder's authority is revoked if for any reason the decision of the event in the manner agreed upon becomes impossible (*o*), or if either party dies before the event, or the loser of it after the event (*p*).

Gaming Act, 1892 (55 & 56 Vict. c. 9), for the word "paid" is there used in its primary sense of paid out and out (*O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Burge* v. *Ashley and Smith, Ltd.*, [1900] 1 Q. B. 744, C. A.).

(*d*) *Varney* v. *Hickman* (1847), 5 C. B. 271.

(*e*) *Cotton* v. *Thurland* (1793), 5 Term Rep. 405; *Howson* v. *Hancock* (1800), 8 Term Rep. 575; *Aubert* v. *Walsh* (1810), 3 Taunt. 277; *Smith* v. *Bickmore* (1812), 4 Taunt. 474; *Martin* v. *Hewson* (1855), 10 Exch. 737; *Hastelow* v. *Jackson* (1828), 8 B. & C. 221.

(*f*) *Brandon* v. *Hibbert* (1814), 4 Camp. 37; *Savage* v. *Madder* (1867), 36 L. J. (EX.) 178.

(*g*) *Howson* v. *Hancock*, *supra*.

(*h*) *Hodson* v. *Terrill* (1833), 1 Cr. & M. 797.

(*i*) *Carr* v. *Martinson* (1859), 1 E. & E. 456. When the terms of the wager provide that disputes shall be settled by named persons, *e.g.*, in the case of a horse race, by the stewards, they are not in the position of arbitrators; their decision need not be unanimous, but if arrived at in good faith and intended to be final, it is binding (*Parr* v. *Winteringham* (1859), 1 E. & E. 394; and see *Benbow* v. *Jones* (1845), 14 M. & W. 193); nor is a steward disqualified from acting because he has betted on the result (*Ellis* v. *Hopper* (1859), 3 H. & N. 766).

(*k*) *Weller* v. *Deakins* (1827), 2 C. & P. 618.

(*l*) *Aubert* v. *Walsh*, *supra*; *Busk* v. *Walsh* (1812), 4 Taunt. 290.

(*m*) *Hastelow* v. *Jackson*, *supra*. This decision was doubted in *Mearing* v. *Hellings* (1845), 14 M. & W. 711; compare, however, *Bate* v. *Cartwright* (1819), 7 Price, 540; *Carr* v. *Martinson*, *supra*; and the observations of COCKBURN, C.J., in *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189. On the other hand, see the observations of DENMAN, C.J., in *Gatty* v. *Field* (1846), 9 Q. B. 431, where the contract was illegal.

(*n*) *Varney* v. *Hickman*, *supra*, *per* MAULE, J., at p. 282; *Strachan* v. *Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697, C. A., *per* SMITH, L.J., at p. 705 see also *Busk* v. *Walsh*, *supra*.

(*o*) *Carr* v. *Martinson*, *supra*; *Sadler* v. *Smith* (1869), L. R. 4 Q. B. 214; affirmed, L. R. 5 Q. B. 40, Ex. Ch.

(*p*) The reasons for this conclusion are these. The authority of an agent ceases upon the death of his principal. Therefore, if the loser dies at any time before his stake has been paid over, the stakeholder ceases to have authority

SECT. 3. Rights of the Parties to the Contract.

Stakeholder's liability for security, or "cover."

562. Appropriation of the stake by the stakeholder, when he is himself a party to the wager (*q*) and the winner of it, is tantamount to payment, after which the stake cannot be recovered from him (*r*). But in such a case the stakeholder's authority to appropriate the sum in his hands extends only to a sum which has been deposited to abide the event, and does not extend to anything deposited with him as security for the performance of the wager, for where there is a deposit by way of security, the property in it does not pass the moment the bet is lost and won. There is something else which must happen, that is, there being a breach of contract, the damages arising therefrom are not paid (*s*). And securities which are deposited by way of cover are deposited as security, and consequently an appropriation by the party with whom they are deposited does not prevent their recovery (*a*).

Stakes deposited with owner of a betting-house.

563. To this general rule, that an action for money had and received does not lie after a deposit has been paid over or appropriated, there is an exception (*b*). When the deposit is made in respect of a bet upon a horse race or other sport, and is received by the owner or occupier of, or, perhaps, by a person using (*c*) a place kept or used as a betting-house, the deposit may be recovered although it has been paid over to or appropriated by the winner.

SECT. 4.—*Agent and Principal.*

SUB-SECT. 1.—*Agent's Rights against his Principal.*

Agent cannot recover money paid, nor for services rendered.

564. Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement by way of gaming or wagering, or to pay any sum of

to pay it to the winner. If either party dies before the determination of the event, the bet, by the custom of betting, goes off; see *Manning* v. *Purcell* (1855), 7 De G. M. & G. 55, C. A.; and so if the survivor proves to be the loser, the stakeholder would nevertheless have no authority to part with the loser's stake. But if the winner dies after the event and before payment over, nothing has occurred to determine the stakeholder's authority.

(*q*) The fact that he is also a party makes no difference to his position as a stakeholder (*Re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383, C. A.; *Manning* v. *Purcell* (1855), 7 De G. M. & G. 55, C. A.; and see note (*p*), p. 272, *supra*).

(*r*) *Strachan* v. *Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697, C. A.

(*s*) *Strachan* v. *Universal Stock Exchange*, [1895] 2 Q. B. 329, C. A.; *Re Cronmire, Ex parte Waud, supra.*

(*a*) *Ibid.*; and *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166.

(*b*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 5: "Any money or valuable thing received *by any such person aforesaid*" (for the meaning of these words, see note (*r*), p. 273, *ante*) "as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction." This section is not impliedly repealed by the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1 (*Lennox* v. *Stoddart, Davis* v. *Stoddart*, [1902] 2 K. B. 21, C. A.); see also *R.* v. *Mortimer*, [1911] 1 K. B. 70, C. C. A., where the receipt of postal orders was held to be equivalent to the receipt of money.

(*c*) The difficulty arises on the meaning to be given to the words "any such person aforesaid" in s. 5 of the Betting Act, 1853 (16 & 17 Vict. c. 119); as to which, see note (*r*), p. 273, *ante*. As to who are "persons using" a betting-house within the statute in question, see p. 295, *post*.

SECT. 4. Agent and Principal.

money by way of commission, fee, reward or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, is null and void, and no action can be brought to recover any such sum of money (*d*).

"Money paid."

The expression "money paid" includes money to be paid, so that an agent cannot claim indemnity for sums which he will be compelled to pay (*e*). Nor does the fact that the person who has made the payment which he seeks to recover is a stranger to the contract under which the sum became due, or even, it seems, the fact that the agent is ignorant that the payment he is making is in respect of a wager, entitle him to recover the amount from his principal (*f*).

A deposit by a party to a wager with the stakeholder is not money "paid" by him so as to be irrecoverable, because the word "paid" is there used in its primary sense of paid out and out (*g*), but a deposit provided and paid by an agent of a party to the wager into the hands of a stakeholder is paid out and out by the agent, and cannot, therefore be recovered either from the principal or the stakeholder (*h*).

SUB-SECT. 2.—*Principal's Rights against his Agent.*

Agent accountable to principal.

565. While the agent cannot recover sums paid by him on his principal's behalf, he remains accountable to his principal for the proceeds of bets proved to have been received by him (*i*). But, even though employed for reward, the agent is not liable to his

(*d*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1. This Act rendered obsolete the decisions in *Read* v. *Anderson* (1884), 13 Q. B. D. 779, C. A., and other similar cases. The expression "no action shall be brought" makes this enactment part of the *lex fori*, so that it operates upon transactions which have taken place abroad if put in suit in England (*Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A.); and see p. 282, *post*.

(*e*) *Levy* v. *Warburton* (1901), 70 L. J. (K. B.) 708.

(*f*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 44. It should, however, be noted that neither of the members of the court who decided the case had any doubt but that the plaintiff in fact knew that the payments he was making were for lost bets, and so they could the more readily come to the conclusion not only that the money was paid "in respect of" bets, but also that it was so paid by the agent. WILLS, J., however, expressly says that it makes no difference whether the agent knew or not (as to which, however, see observations of FLETCHER MOULTON, L.J., in *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., at p. 715) but that the principal might, by representing that the sums which he required his agent to pay were not due in respect of bets, be estopped from setting up the Act.

(*g*) *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Burge* v. *Ashley and Smith, Ltd.*, [1900] 1 Q. B. 744, C. A.

(*h*) *Carney* v. *Plimmer*, [1897] 1 Q. B. 634, C. A. And see the distinction between this case and *O'Sullivan* v. *Thomas*, *supra*, drawn by ROMER, L.J., in *Burge* v. *Ashley and Smith, Ltd.*, *supra*.

(*i*) *Beeston* v. *Beeston* (1875), 1 Ex. D. 13; *Johnson* v. *Lansley* (1852), 12 C. B. 468; *Bridger* v. *Savage* (1885), 15 Q. B. D. 363, C. A.; *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248. It is not an uncommon practice for a bookmaker to represent himself as an agent, when he is really taking the bets as a principal. In such cases, if sued as an agent for the proceeds of bets alleged to have been won, he may be estopped from setting up that he was a principal and so availing himself of the Gaming Act, 1845 (8 & 9 Vict. c. 109); compare *Moore* v. *Peachey* (1891), 7 T. L. R. 748; *Potter* v. *Codrington* (1892), 9 T. L. R. 54, and *Grimerd* v. *Wiltshire* (1894), 10 T. L. R. 505. Receipt of the proceeds of a

principal for failure to carry out his principal's instructions. Had the bets been made and won, the principal could not have recovered from the loser, and no damage is provable (*k*).

SECT. 5.—*Partnership.*

Betting partnerships.

566. An agreement to enter into betting transactions upon a joint account, or a partnership in a betting business, is clearly not itself a wager. Nor would it appear to be a contract "by way of gaming or wagering" (*l*), and therefore the express promise of each of the partners, or that which is to be implied from their relationship, to account to the other for the proceeds of the business which he may have received is not void (*m*), and the liability of a partner to account for moneys of the partnership in his hands is the same as that of any other agent. But since a partner cannot sue his partner for, or claim credit for, sums expended by him in paying lost bets, the promise of his partner, whether express or implied, to repay him being void (*n*), it seems that no real partnership can exist (*o*).

Further, when payments have been made by one partner out of partnership funds provided by the other, that other cannot recover

bet, however, is not proved merely by evidence that the agent accepted a commission to make a bet on a particular event, and that the event has been decided favourably. The proceeds must be traced to the agent's hands (*Pritchard* v. *Doughton, Lovyck & Co.* (1900), 16 T. L. R. 377, C. A.); but in the absence of any evidence to the contrary, delivery of a commission account may establish a *primâ facie* case (*Catigi* v. *M'Gregor* (1907), 51 Sol. Jo. 266).

(*k*) *Cohen* v. *Kittell* (1889), 22 Q. B. D. 680. Since the Gaming Act, 1892 (55 & 56 Vict. c. 9), the agent's employment, unless he is paid in advance, is necessarily gratuitous, in which case no action would lie upon that ground.

(*l*) There is, however, an expression of judicial opinion to the contrary in *Saffery* v. *Mayer*, [1901] 1 K. B. 11, C. A., *per* A. L. SMITH, M.R. The facts were as follows: One Vautin and the defendant entered into partnership for the purpose of working the defendant's system of betting on horse races. Vautin found the money for the venture, not by way of loan to the defendant, but by way of partnership capital, while the defendant, on his side, found the skill. Bets were made, lost, and paid to the winners by the defendant, and the whole of the money, which had been found by Vautin, was thereby exhausted. The defendant then gave to Vautin his promissory notes for one-half of the losses. Vautin's trustee in bankruptcy sued upon the notes, and the defendant pleaded that the consideration for them was money paid by him under or in respect of wagers and was therefore void. The court held that Vautin had, in effect, paid the winners by the hand of the defendant, and that as the consideration for the notes was the defendant's promise to refund his share of those payments, the consideration was void. But A. L. SMITH, M.R., rested his judgment on the ground that, in handing the money to the defendant, Vautin made a payment in respect of an agreement to bet upon a joint account, which agreement was itself by way of wagering, and that such payment, being the consideration for the notes, was a void consideration. It is submitted that in view of the earlier authorities, cited in note (*m*), *infra*, to which his Lordship's attention was not called, the reasons given by the other members of the court are preferable; compare *Faikney* v. *Reynous* (1767), 4 Burr. 2069; *Duvergier* v. *Fellows* (1830), 10 B. & C. 826.

(*m*) *Johnson* v. *Lansley* (1852), 12 C. B. 469; *Beeston* v. *Beeston* (1875), 1 Ex. D. 13; *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248.

(*n*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1.

(*o*) See observations of FLETCHER MOULTON, L.J., in *Hyams* v. *Stuart King*, [1908] 2 K. B., 696, C. A.; but compare those of FARWELL, L.J., *ibid.*, at p. 725. As to partnership generally, see title PARTNERSHIP.

SECT. 5. Partnership.

from the one his share of the payments, for in that case the payments, though made to the winners by the hand of the one, are in effect payments by the other, and he is therefore seeking to recover payments made by him in respect of wagers (*p*). So that a partner who has paid more than his share of losses, either directly by paying the winners out of his own moneys, or indirectly by putting a fund at the disposal of his partner for the purpose, cannot make his co-partner repay such excess.

Account.

567. It therefore seems doubtful whether an account would be ordered (*q*), even where the betting transaction was not illegal. But where the intention of the parties is that the business shall be carried on illegally (*r*), no account will be ordered (*s*). The fact that one of the parties has carried on the business illegally without the knowledge of his co-partner would, of itself, afford no defence to an action for an account, though questions might arise, upon taking the account, as to the allocation of sums in fact earned by illegal practices (*s*).

SECT. 6.—*Money Lent.*

For gaming.

568. Money or other valuable thing knowingly lent for the purpose of gaming (*t*) or of betting upon the sides or hands of those who do or shall game at any game, or lent at the time and place of play to anyone so gaming or betting, or who shall during such play so play or bet, is not recoverable (*a*). When counters are used the money which they represent stands upon the same footing (*b*).

For other wagers.

569. On the other hand, money lent for the purposes of betting upon contingencies other than games (*c*) is recoverable.

(*p*) *Saffery* v. *Mayer*, [1901] 1 K. B. 11, C. A.

(*q*) In one case decided since the passing of the Gaming Act, 1892 (55 & 56 Vict. c. 9), a partnership account of a bookmaker's business was ordered to be taken. The Gaming Act, 1892 (55 & 56 Vict. c. 9), does not seem to have been brought to the attention of the court, which was directed to another matter (*Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496). It is possible that the decision would have been different if the effect of the legislation had been brought under notice. See the observations of A. L. SMITH, M.R., in *Saffery* v. *Mayer*, *supra*, and of DARLING, J., in *Thomas* v. *Dey* (1908), 24 T. L. R. 272. On the other hand, in *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., FARWELL, L.J., was not prepared to overrule *Thwaites* v. *Coulthwaite*, *supra*.

(*r*) As, for instance, the business of a gaming or betting house.

(*s*) *Aubert* v. *Maze* (1801), 2 Bos. & P. 371; *Re Scott, Ex parte Bell* (1813), 1 M. & S. 751; *Thwaites* v. *Coulthwaite*, *supra*. In that case the question arose as to the defendant's liability to account for winnings, alleged to have been earned by illegal practices, but was not decided, CHITTY, J., saying that there seemed to be no authority upon the point; compare, however, *Sharp* v. *Taylor* (1849), 2 Ph. 801; *Alcinbrook* v. *Hall* (1766), 2 Wils. 309, *Faikney* v. *Reynous* (1767), 4 Burr. 2069. It is submitted that in the circumstances the defendant could not set up the illegality in answer to a claim for money had and received.

(*t*) The word "gaming" means playing a game for stakes, even though the game be one of skill (*R.* v. *Ashton* (1852), 1 E. & B. 286; *Patten* v. *Rhymer* (1860), 3 E. & E. 1; *Danford* v. *Taylor* (1869), 20 L. T. 483; *Bew* v. *Harston* (1878), 3 Q. B. D. 454; *Dyson* v. *Mason* (1889), 22 Q. B. D. 351). *Secus*, if there is no stake (*Lockwood* v. *Cooper*, [1903] 2 K. B. 428).

(*a*) This is brought about by the conjoint effect of two statutes (Gaming Act, 1710 (9 Ann. c. 19), s. 1, and Gaming Act, 1835 (5 & 6 Will. 4, c. 41), as to which, see note (*n*), p. 280, *post*.

(*b*) *St. Croix* v. *Morris* (1885), Cab. & El. 485.

(*c*) The words of the Gaming Act, 1710 (9 Ann. c. 19), s. 1, are gaming or

SECT. 6. Money Lent.

So also loans made to enable the borrower to pay bets, no matter upon what events, which he has lost, are recoverable (*d*), unless, in the case of gaming contracts, the money is lent at the time and place of play to a player (*e*). To pay bets.

But although these two classes of loans are recoverable, yet when the money is paid at the request of a party to a wager, either to the winner of it (*f*), or to a stakeholder as a deposit to abide the event (*g*), no action for its repayment lies against the party at whose request it was paid (*h*). Money paid at request.

SECT. 7.—*Securities.*

570. All notes, bills, bonds, judgments (*i*), mortgages or other securities or conveyances whatever, the whole or any part of the consideration for which is for money or other valuable thing won Securities given for gaming considerations.

playing "at any game whatsoever." These games have been held to be the same as those mentioned in stat. (1664), 16 Car. 2, c. 7 (now repealed), namely, cards, dice, tables, tennis, bowles, kittles, shovel-board, cock-fighting, horse races, dog matches, foot-races, or other pastimes or games whatsoever (*Blaxton* v. *Pye* (1766), 2 Wils. 309; *Applegarth* v. *Colley* (1842), 14 M. & W. 723; *Hay* v. *Ayling* (1851), 16 Q. B. 423; *Woolf* v. *Hamilton*, [1898] 2 Q. B. 337, C. A.). Cricket is also within the statute (*Jeffreys* v. *Walter* (1748), 1 Wils. 220; *Hodson* v. *Terrill* (1833), 1 Cr. & M. 797); and foot-races (*Batty* v. *Marriott* (1848), 5 C. B. 818; *Lynall* v. *Longbothom* (1756), 2 Wils. 36); and dog matches include coursing (*Daintree* v. *Hutchinson* (1842), 10 M. & W. 85). On the other hand, although horse racing is a game within the meaning of the statute, a bet as to what horse has won a race already run is not a bet upon the sides or hands of those that do or shall play, but upon the accuracy of the information or opinion of the parties (*Pugh* v. *Jenkins* (1841), 1 Q. B. 631); so also a bet as to what are the rules of a game is not a bet upon a game (*Pope* v. *St. Leger* (1693), 1 Lut. 487).

(*d*) *Re Lister, Ex parte Pyke* (1878), 8 Ch. D. 754, C. A. The money in this case was paid to the winners of the bets at the request of the loser, and was not strictly lent to the loser, a distinction which was not then, but is now (in view of the Gaming Act, 1892 (55 & 56 Vict. c. 9)), of importance. It is submitted, however, that the reasoning of the judgment covers money lent.

(*e*) Gaming Act, 1710 (9 Ann. c. 19), s. 1; see note (*n*), p. 280, *post*.

(*f*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 44.

(*g*) *Carney* v. *Plimmer*, [1897] 1 Q. B. 634, C. A.

(*h*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1. In relation to wagers the distinction between money lent and money paid at request appears to be this, that in the case of a loan the money is not paid by the lender "under or in respect of" a wager, the lender being unconcerned with its application; whereas in the case of a payment by request the money is allocated to a particular purpose, and the payment is "in respect of" a wager. When, however, the transaction is strictly a loan, and yet hampered with a stipulation that it shall be applied in respect of a wager, the transaction may perhaps stand upon a different footing (compare *Hill* v. *Fox* (1859), 4 H. & N. 359, Ex. Ch.); at any rate, if the nature of the arrangement between the lender and borrower is such that a payment made by the latter in pursuance of it would in effect be a payment made by the lender, as in *Saffery* v. *Mayer*, [1901] 1 K. B. 11, C. A. And where money is paid to the winner of a wager by a third person in pursuance of an arrangement between the loser and the third party entered into before the event, the money is "lent" within the meaning of the Gaming Act, 1710 (9 Ann. c. 14), s. 1 (*Parker* v. *Alcock* (1831), You. 361); with the result that securities for repayment of it are deemed to be given for an illegal consideration; whereas securities for money paid at request, in the absence of such an arrangement, are given for no consideration.

(*i*) Judgments obtained adversely are not included (*Chapman* v. *Lane* (1841), 11 Ad. & El. 980, Ex. Ch.).

SECT. 7. Securities.

by gaming or playing at any game (*k*), or by betting on the sides or hands of such as do game (*l*), or for repaying any money knowingly lent for such gaming or betting (*m*), or lent at the time and place of such play to any person so gaming or betting, or who shall during such play so play or bet, are to be deemed to have been given for an illegal consideration (*n*).

(*k*) The games here intended are the same as those enumerated in stat. (1664), 16 Car. 2, c. 7 (now repealed), namely, cards, dice, tables, tennis, bowles, kittles, shovel-board, cock-fighting, horse races, dog matches, foot-races, or other pastimes or games whatsoever (*Blaxton* v. *Pye* (1766), 2 Wils. 309; *Applegarth* v. *Colley* (1842), 10 M. & W. 723; *Hay* v. *Ayling* (1851), 16 Q. B. D. 423; *Woolf* v. *Hamilton*, [1898] 2 Q. B. 337, C. A.; see note (*c*), pp. 278, 279, *ante*). The result is that all games, whether of skill or chance, are within the section (*Sigel* v. *Jebb* (1819), 3 Stark. 1; and see *Bubb* v. *Yelverton* (1870), L. R. 9 Eq. 471, and title BONDS, Vol. III., p. 86).

(*l*) Presumably the word "game" is here used as including playing for no stakes, as otherwise money lost by betting on those playing simply for recreation, or for a prize which was not a stake, would not be an illegal consideration; compare, however, the words "gaming or playing at any game" which occur earlier in the section; and see *R.* v. *Ashton* (1852), 1 E. & B. 286, where it was held that there must be stakes to constitute gaming, and *Lynall* v. *Longbothom* (1756), 2 Wils. 36.

(*m*) Money paid by a third party to the winner of a wager on a game in pursuance of an arrangement between the loser and the third party made before the decision of the event is "lent" within the meaning of this section (*Parker* v. *Alcock* (1831), You. 361; and compare note (*h*), p. 279, *ante*).

(*n*) Gaming Act, 1710 (9 Ann. c. 19), s. 1; Gaming Act, 1835 (5 & 6 Will. 4, c. 41). The Gaming Act, 1710 (9 Ann. c. 19), s. 1, so far as is material, is as follows:—"All notes, bills, bonds, judgments, mortgages or other securities . . . entered into, or executed by any person when the whole or any part of the consideration of such securities shall be for any money or other valuable thing whatsoever won by gaming or playing at any game whatsoever, or betting on the sides or hands of them that do or shall play at any of the said games, or for repaying any money knowingly lent for the purpose of gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be void to all intents and purposes."

It will be observed that this enactment avoids the securities mentioned, without expressly avoiding the consideration for them, and there were conflicting decisions, which it is now immaterial to consider, but which are referred to in *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A., upon the question whether the actual bets or loans mentioned in the section were also thereby made void transactions. These doubts were set at rest by the passing of the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), by which all securities made void by the statute of Anne were to be deemed to be given for an illegal consideration, and it was laid down in *Applegarth* v. *Colley* (1842), 10 M. & W. 723, that it was then impossible to impute to the legislature an intention so absurd as that the consideration should be good until some security was given, and then that by the giving of that security the consideration should become bad. It is not, therefore, strictly speaking, the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), which makes the transactions bad, but that statute supplies the grounds for an inference that the statute of Anne was intended to have that effect. If the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), had any operation upon the transactions themselves, its effect would be to make them illegal, so that all gaming contracts and bets upon games would be illegal and not void only. This construction was contended for in *Re Lister, Ex parte Pyke* (1878), 8 Ch. D. 754, C. A., but the point was not decided. It seems clear, however, at any rate having regard to the words of the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 14, that gaming contracts are to be considered void only; compare *Read* v. *Anderson* (1884), 13 Q. B. D. 779, C. A., where the agent would not have been entitled to an indemnity had the contract been illegal, and *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496, where it

SECT. 7. Securities.

Those given for other considerations.

571. Securities given for other considerations connected with betting transactions depend for their effect upon the validity of the consideration (*o*). Thus, securities for money lost by bets which are not upon games are given for no consideration, the bet being null and void, but not illegal (*p*), while those for money lent for making such bets are perfectly good (*q*), though the consideration would be deemed to be illegal had the bets been upon sports or pastimes (*r*). So also, although money paid at the loser's request is not deemed to be an illegal consideration (*s*), unless paid in pursuance of an arrangement made before the determination of the event, the event in question being the result of a sport or game (*t*), it is no consideration, whatever the event upon which the bet was made (*u*).

Effect between remote parties.

572. The distinction between the consideration being void and being illegal is not material between the immediate parties to the security, for in neither case can it be recovered upon. But when the security is a negotiable instrument, a transferee may successfully sue upon it, upon proof that he is a holder in due course (*a*). Where, however, payment of a security such as is deemed to be given for an illegal consideration has been made in all or in part to any indorsee, holder, or assignee, the money so paid is deemed to have been paid for and on account of the person to whom such security was originally given, and is deemed to be a debt due and owing from such last-mentioned person to the person who has paid the money, and is recoverable accordingly (*b*).

would have been unnecessary to rely upon the Betting Act, 1853 (16 & 17 Vict. c. 119).

(*o*) There is no statutory enactment directly affecting securities given for considerations other than those mentioned in the Gaming Act, 1710 (9 Ann. c. 19), but the transactions themselves are in some cases made void, *e.g.*, by the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, or the Gaming Act, 1892 (55 & 56 Vict. c. 9), see pp. 271, 276, *ante;* and, in other cases, illegal, *e.g.*, lotteries, see p. 301, *post.*

(*p*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18; *Lilley* v. *Rankin* (1886), 56 L. J. (Q. B.) 248.

(*q*) Gaming Act, 1710 (9 Ann. c. 19), applies only to sports and pastimes. No other statute affects money lent for betting; see p. 279, *ante.*

(*r*) See note (*n*), p. 280, *ante.*

(*s*) *Re Lister, Ex parte Pyke* (1878), 8 Ch. D. 754, C. A.; *Alcinbrook* v. *Hall* (1766), 2 Wils. 309; and see note (*h*), p. 279, *ante.*

(*t*) *Parker* v. *Alcock* (1831), You. 361.

(*u*) Gaming Act, 1892 (55 & 56 Vict. c. 9).

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 29, 30. In the case of bills, cheques etc. given for money won at gaming etc. at "games" within the Gaming Act, 1710 (9 Ann. c. 19), a holder for value with notice cannot recover (*Hay* v. *Ayling* (1851), 16 Q. B. 423; *Woolf* v. *Hamilton*, [1898] 2 Q. B. 337, C. A.). But in the case of bills, cheques etc. in respect of contracts within the Gaming Act, 1845 (8 & 9 Vict. c. 109), only, a holder for value even with notice can recover (*Lilley* v. *Rankin, Rankin* v. *Lilley and Baird* (1886), 56 L. J. (Q. B.) 248; *Fitch* v. *Jones* (1855), 5 E. & B. 238; and see *Goodson* v. *Baker* (1908), 98 L. T. 415; *Browne* v. *Bailey* (1908), 24 T. L. R. 644; *Barkworth* v. *Gant* (1909), 26 T. L. R. 165, C. A.; and title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 501.

(*b*) Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 2; *Gilpin* v. *Clutterbuck* (1849), 13 L. T. (o. s.) 71, 159. In *Crawley* v. *White* (1898), 78 L. T. 167, an acceptor who had paid, sued the drawer of a bill to recover the sum paid under this section, and failed to recover. The report is, however, of little value

SECT. 8. Transactions taking place Abroad.

SECT. 8.—*Transactions taking place Abroad.*

No action lies to recover winnings or for services rendered.

573. The winner of a wager which was made abroad, even though he could recover upon it in the country where it was made, cannot do so in this country, either from the loser or from a stakeholder (*c*). Nor can one whose cause of action arises abroad, though it be good there, recover in this country money he has paid for himself or another, under or in respect of a wager, nor any commission, fee or reward, for services in connection with any wager (*d*).

Loans.

574. Loans made abroad for the purpose of gaming or betting upon games taking place abroad, and there lawful, seem to be recoverable in the English courts (*e*).

Securities.

575. Since any bet, wherever made, is unenforceable in this country, it follows that a security given for its performance is given without consideration, and cannot be put in suit in this country between the immediate parties (*f*); and this is also the case when the consideration for the security is a payment made in respect of, or the promise of a commission for services connected with, a wager (*g*).

But when the question is whether the consideration is to be deemed to be illegal, it is necessary to ascertain how the English statutes in that behalf (*h*) are to be applied. If the intention of the parties appears, from the facts of the case, to be that the English law shall apply, the consideration will be deemed to be illegal (*i*); and in such a case the plaintiff cannot better his position by suing upon the consideration (*k*). But in the absence of evidence

because it does not appear whether the consideration was a gaming, as distinguished from a wagering, contract. But see the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1.

(*c*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18.

(*d*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1. The Gaming Acts of 1845 and 1892 are both part of the *lex fori* going *ad litis ordinationem* (*Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A.), and are therefore to be applied in any suit brought in this country upon any of the transactions aimed at by them.

(*e*) The question depends upon whether the Gaming Act, 1710 (9 Ann. c. 19), applies to transactions taking place abroad. The balance of authority is in favour of the view that it does not, and that such loans are consequently recoverable; see note (*l*), p. 283, *post*.

(*f*) The plaintiff would not better his position by exchanging an English security, *e.g.*, promissory notes, for foreign bills or foreign stamps (*Wynne* v. *Callander* (1826), 1 Russ. 293).

(*g*) *Moulis* v. *Owen*, *supra*.

(*h*) Gaming Act, 1710 (9 Ann. c. 19), and Gaming Act, 1835 (5 & 6 Will. 4, c. 41). These statutes apply only to bets upon sports or pastimes, and therefore, if the bets are upon any other contingency, this question cannot arise.

(*i*) *Robinson* v. *Bland* (1760), 1 Wm. Bl. 234, 256; *Moulis* v. *Owen*, *supra*, where the instruments sued upon were payable in England, and the courts drew the inference that the parties intended the English law to apply. See also *Browne* v. *Bailey* (1908), 24 T. L. R. 644, which is to be supported on the same ground.

(*k*) Because the Gaming Act, 1710 (9 Ann. c. 19), which, *ex hypothesi*, the parties have made applicable, avoids the consideration as well as the security (*M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434; *Applegarth* v. *Colley* (1842), 10 M. & W. 723; and see note (*a*), p. 278, and note (*n*), p. 280, *ante*; *Moulis* v. *Owen*, *supra*, *per* COZENS-HARDY, L.J., at p. 756, where it is pointed out that, assuming the Gaming Act, 1710 (9 Ann. c. 19), and the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), to be of local application only, the strange result follows

of such an intention, it seems that the English law would not be applied (*l*).

SECT. 8. Transactions taking place Abroad.

SECT. 9.—*Time or Difference Bargains.*

Contracts for "differences."

576. Agreements between those who are only ostensibly buyers and sellers of stocks and shares to pay or receive the differences between their prices on one day and their prices on another day are contracts by way of gaming and wagering, and the differences cannot be recovered (*m*), even when there has been a subsequent agreement by the loser to apply the amount in a *bonâ fide* purchase of stock; nor, in such a case, has the winner a right to recover damages for the loser's failure to purchase (*n*).

No wager between principal and agent.

577. But since in transactions in stocks and shares the true nature of the bargain is sometimes involved in some obscurity, the relations in which the parties stand towards one another must be ascertained. If one who is desirous of "speculating" employs a broker on the Stock Exchange to buy or sell for him, their relation is that of principal and agent. The broker charges a commission for his services, and a rise or fall in the price of the stocks purchased or sold does not affect him. If such be the true relation between the parties, there is nothing at stake between them, and there is no wager (*o*). And although the broker be employed to make wagers and does so, while this will not make the transaction between him and his client a wager, yet the broker will not be

that a parol contract made abroad may be valid if there is no security for the loan, although if there is a security by way of negotiable instrument payable in England both the debt and the security are bad).

(*l*) The authorities in favour of the view that the Gaming Act, 1710 (9 Ann. c. 19), and the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), apply only to transactions taking place in England are *Quarrier* v. *Colston* (1842), 1 Ph. 147; *King* v. *Kemp* (1863), 8 L. T. 255; the dissentient judgment of FLETCHER MOULTON, L.J., in *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A. (in which case the other members of the court did not decide this point), and *Saxby* v. *Fulton*, [1909] 2 K. B. 208, C. A. In *Robinson* v. *Bland* (1760), 1 Wm. Bl. 234, 256, which was an action upon a negotiable instrument payable in England, and upon the consideration for it, which was partly money lent for gaming, it was held that while the instrument being English was void as a writing, the plaintiff could recover the consideration. As, however, it had not then (1760) been decided that the statute under which the instrument was held void (Gaming Act, 1710 (9 Ann. c. 19)) avoided also the consideration, the decision does not elucidate this point. On the other hand, in *Moulis* v. *Owen*, *supra*, COZENS-HARDY, L.J., at p. 756, suggests a doubt whether the decision in *Quarrier* v. *Colston*, *supra*, would now be followed in view of the principle affirmed in *Kaufman* v. *Gerson*, [1904] 1 K. B. 591, C. A., and *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, that contracts will not be enforced in this country which conflict with what are deemed in England to be the essential moral and public interests. The decision in *Quarrier* v. *Colston*, *supra*, was expressly followed by BRAY, J., in *Saxby* v. *Fulton*, *supra*, in which case, however, it was not found as a fact that the money was lent for the purposes of gaming, so that opinion expressed upon this question was not necessary to the decision.

(*m*) *Grizewood* v. *Blane* (1851), 11 C. B. 526; *Barry* v. *Croskey* (1861), 2 John. & H. 1; and see pp. 267, 268, *ante*; see also *Cooper* v. *Neil*, [1878] W. N. 128, C. A., and title STOCK EXCHANGE.

(*n*) *Re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383, C. A.

(*o*) *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685, C. A.; *Forget* v. *Ostigny*, [1895] A. C. 318, P. C.; *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; affirmed, [1893] 1 Q. B. 256, C. A.

SECT. 9. Time or Difference Bargains.

able to recover from his client losses he may have paid, or commission for his services (*p*). As long, therefore, as the relation between the parties is really only that of broker and client, the contract between them cannot be a wager, even although the broker may know that the client does not expect to be called upon to settle the transaction except by the payment of differences (*q*).

Stipulation between principals for settlement by payment of differences.

578. It is only when persons stand in the relation of principals upon the contract impugned that there can be a wager between them. The broker is, by the custom of the Stock Exchange, a principal on the contract with the jobber, and may, while ostensibly the agent of his client, be buying or selling to his client (*r*) as principal; so also the jobber is a principal on the contract with the client made through the broker. In any one of these cases the principals may expect that the stock will not be taken up, but that the account will be settled by the payment of differences. But unless that expectation forms a stipulation in the contract between them, there is no wager (*s*).

On the other hand, if there be such a stipulation either upon the face of the contract or to be inferred from it, it is immaterial that one party or the other by the express terms of it, or by exercising an option, can require delivery of the stock (*t*).

Disregard of these principles has led to transactions called time or difference bargains being considered wagers, because they result only in the payment of differences, and not in the actual delivery of stock. These bargains are, in fact, the result of two perfectly distinct and perfectly legal transactions, namely, first, a bargain to buy or sell, and, secondly, a subsequent bargain that the first shall not be carried out, and it is only when the first is entered into upon the understanding that it is not to be carried out that an unenforceable bargain results (*a*).

Part II.—Games, Gaming, and Gaming-houses.

SECT. 1.—*Games and Gaming.*

Unlawful games.

579. At common law all games, except perhaps cock-fighting (*b*), are lawful, and now, though certain games are by statute unlawful,

(*p*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1.

(*q*) *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685, C. A.; *Forget* v. *Ostigny*, [1895] A. C. 318, P. C.; *Re Rogers, Ex parte Rogers* (1880), 15 Ch. D. 207, C. A.

(*r*) Compare *Re Rogers, Ex parte Rogers, supra.*

(*s*) *Grizewood* v. *Blane* (1851), 11 C. B. 526; *Thacker* v. *Hardy, supra*; *Forget* v. *Ostigny, supra*; *Philip* v. *Bennett & Co.* (1901), 18 T. L. R. 129. As between broker and client, where the broker has by the custom of the Stock Exchange to become personally liable to the jobber to take or deliver the stock, the probabilities against his making a wagering contract with his client are strong.

(*t*) *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166; *Re Gieve*, [1899] 1 Q. B. 794, C. A.

(*a*) *Thacker* v. *Hardy, supra, per* LINDLEY, J., at p. 689.

(*b*) See p. 285, *post.*

all games of mere skill, as distinguished from those of chance, or those of chance and skill combined (*c*), are lawful, unless they are carried on in a common gaming-house (*d*). The games which are illegal by statute are lotteries (*e*), ace of hearts, pharaoh, basset, hazard (*f*), passage, and all games invented or to be invented with dice or other device of a like nature (backgammon and other games then (*g*) played with backgammon tables excepted), and roulet (*h*).

Cock-fighting.

Baiting animals.

580. Cock-fighting seems to have been an unlawful game at common law (*i*). If so, it would be unlawful irrespective of the place where it is carried on. Keeping any place for fighting or baiting lions, bears, badgers, cocks, bulls, dogs, or other animals is prohibited within the metropolitan police area, and persons found upon the premises without lawful excuse are liable to be arrested and fined (*k*). Substantially the same provisions are made of general application by a later statute (*l*), which also imposes a penalty on persons who encourage, aid, or assist in the fighting or

(*c*) *E.g.*, baccarat (*Jenks* v. *Turpin* (1884), 13 Q. B. D. 505); chemin-de-fer (*Fairtlough* v. *Whitmore* (1895), 64 L. J. (CH.) 386).

(*d*) Gaming Act, 1845 (8 & 9 Vict. c. 109), preamble, and s. 1; *Jenks* v. *Turpin*, *supra*. Prizes for lawful games are by the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, excepted from its operation, and it seems that games which are otherwise lawful, in the sense that the players do not incur penalties by playing them, are unlawful within the meaning of that section, if they are carried on in a common gaming-house. Stat. (1541-2) 33 Hen. 8, c. 9, s. 8, entitled a Bill for the Maintaining Artillery and Debarring of Unlawful Games, while not expressly declaring any game unlawful, imposes penalties on those who keep for gain any common house or place of, and upon those who there play at, bowling, tennis, and certain other games of mere skill, together with "dicing, tables, carding . . . or any unlawful new game then invented or thereafter to be invented." The Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 1, repeals so much of this Act as declares games of mere skill to be unlawful, but preserves the penalties on those who keep, or game in, common gaming-houses. The inference seems to be that the legislature, in taking games of mere skill out of the category of unlawful games, intended all others to fall within it, or at any rate assumed that they did. See *Jenks* v. *Turpin*, *supra*, at p. 521.

(*e*) Stat. (1698) 10 Will. 3, c. 23, s. 1; Gaming Act, 1738 (12 Geo. 2, c. 28), preamble and s. 2; Gaming Act, 1739 (13 Geo. 2, c. 19), s. 9; and see p. 301, *post*.

(*f*) Gaming Act, 1738 (12 Geo. 2, c. 28), ss. 2, 3.

(*g*) That is, at the time of the passing of the Gaming Act, 1739 (13 Geo. 2, c. 19), s. 9.

(*h*) Gaming Act, 1744 (18 Geo. 2, c. 34), s. 2.

(*i*) Bac. Abr., tit. Gaming (A). The note is "an information against a person for using the game of cock-fighting may be at common law," and cites *R.* v. *Howel* (1675), 3 Keb. 465, 510. On reference to these citations the indictment, however, seems to have been for keeping a cock-pit. The court "took their measures by stat. (1541-2) 33 Hen. 8, c. 9," and fined the defendant accordingly.

(*k*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 47. On summary conviction the keeper of a cock-pit is liable to a fine not exceeding £5, or one month's imprisonment, and those found therein to a fine of 5*s*. Keeping a cock-pit is also punishable at common law (see note (*i*), *supra*), and conviction under this Act does not exempt the keeper from being so punished.

(*l*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 3. On summary conviction the "keeper" is liable to a fine not exceeding £5 for every day on which the place is kept. For distribution of penalties, see *ibid.*, s. 21. The complaint must be made within one month (*ibid.*, s. 14). See also title ANIMALS, Vol. I., p. 412.

SECT. 1. Games and Gaming.

baiting (*m*). It could scarcely be contended, in the face at any rate of the later statute, that the practices specified were not unlawful in themselves.

Lawful games.

581. Games which do not fall within the above-mentioned exceptions are lawful, and among them the following games have been expressly declared to be so:—Horse racing (*n*), steeplechasing (*o*), foot racing (*p*), billiards (*a*), backgammon (*b*), games played with backgammon tables (*b*), and dominoes (*c*).

Horse racing.

582. Horse racing, although a lawful game (*d*), is subject to restrictions in the case of races within ten miles of London (*e*). The expression "horse race" covers any race in which a horse runs either against another horse or against time for a prize or a wager and at which more than twenty persons are present (*f*). Any horse

(*m*) The penalty is not exceeding £5 for each offence (Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 3). The offence consists in aiding or assisting in the fighting at a place kept or used for the purpose. An isolated instance of such use is not sufficient evidence of the place in question being kept or used for the purpose within the meaning of the section, and those who assist in the fighting on the occasion do not commit the offence (*Clark* v. *Hague* (1859), 2 E. & E. 281; *Morley* v. *Greenhalgh* (1863), 3 B. & S. 374).

(*n*) *Evans* v. *Pratt* (1842), 3 Man. & G. 759; and see note (*d*), *infra*.

(*o*) *Ibid.*

(*p*) *Batty* v. *Marriott* (1848), 5 C. B. 818.

(*a*) *Parsons* v. *Alexander* (1855), 5 E. & B. 263; and see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*b*) The Gaming Act, 1739 (13 Geo. 2, c. 19), s. 9, making certain games illegal, excepts from its operation "backgammon and other games now played with backgammon tables."

(*c*) *R.* v. *Ashton* (1852), 1 E. & B. 286.

(*d*) As the emancipation of horse racing was brought about by a tortuous course of legislation, and not by any single or direct enactment, it may be useful to point out the steps by which it came about. The stat. (1664) 16 Car. 2, c. 7, prohibited the loss of more than £100 on credit by playing at, among other games, horse racing. The Gaming Act, 1710 (9 Ann. c. 19), imposed a penalty on persons who won more than £10 at a time by playing at games which were held to include horse racing (*Applegarth* v. *Colley* (1842), 10 M. & W. 723; and see *Goodburn* v. *Marley* (1741), 2 Stra. 1159). The result was, inferentially, to make horse races for stakes greater than £10 illegal, and consequently numbers of races took place for small stakes, which tended, according to the preamble to the Gaming Act, 1739 (13 Geo. 2, c. 19), to impoverish the breed of horses. As a remedy the Gaming Act, 1739 (13 Geo. 2, c. 19), prohibited races for a less stake than £50, thus, inferentially again, legalising those for that or a greater stake. This Act also contained provisions as to the weights which horses were to carry. The provisions as to the weights were repealed by the Gaming Act, 1744 (18 Geo. 2, c. 34), which went on to enact that races, at any weights, for more than £50 should be lawful as though the Gaming Act, 1710 (9 Ann. c. 19), had not been passed. Then was passed stat. (1840) 3 & 4 Vict. c. 5, which repealed the Gaming Act, 1739 (13 Geo. 2, c. 19), ss. 1—8. This raised the question whether the net result of this legislation, in view of the repeal of the provisions which had inferentially legalised races for more than £50, was to revive the old illegality created by the statute of Anne or to remove all restrictions, and in *Evans* v. *Pratt* (1842), 3 Man. & G. 759, it was held that at any rate the express provision of the Gaming Act, 1744 (18 Geo. 2, c. 34), authorising races for more than £50, was left unaffected. Finally, the provisions of the Gaming Act, 1710 (9 Ann. c. 19), above referred to, were repealed by the Gaming Act, 1845 (8 & 9 Vict. c. 109).

(*e*) Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18).

(*f*) *Ibid.*, s. 1.

race at any place within a radius of ten miles of Charing Cross, unless in a place licensed for the purpose, is prohibited (*g*). But the owner, lessee, or occupier of any open or enclosed place can apply to the justices for a licence (*h*). A penalty is imposed on any person who shall take part in any horse race in any unlicensed place (*i*), and it is a misdemeanour to be the owner, or lessee, or in possession or occupation of any unlicensed place upon which a horse race is held (*k*). Persons injured or inconvenienced by a race which contravenes the Act are given the common law remedies as for a nuisance against those taking part in the race and the owners, lessees, and occupiers of the place where it is held (*l*).

Gaming.

583. Gaming, which is playing a game, whether of skill or chance, for stakes (*m*), is not in itself an offence, and at common law playing in a common gaming-house does not seem to have been an offence (*n*). But gaming at any unlawful games is unlawful gaming (*o*), and those who do so are liable to penalties (*p*), while those who play or game at any games in a common gaming-house are also liable to penalties (*q*).

SECT. 2.—*Gaming-houses.*

SUB-SECT. 1.—*What constitutes a Common Gaming-house.*

Definition.

584. A common gaming-house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming (*r*).

It is not necessary that the house should be open to the public

(*g*) Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), s. 2.

(*h*) *Ibid.*, s. 3.

(*i*) *Ibid.*, s. 5. The penalty is a fine not exceeding £10, or two months' imprisonment, on summary conviction.

(*k*) *Ibid.*, s. 6. The penalty is a fine of from £5 to £25, or imprisonment for one to three months, on indictment.

(*l*) *Ibid.*, s. 7.

(*m*) *R.* v. *Ashton* (1852), 1 E. & B. 286; *Patten* v. *Rhymer* (1860), 3 E. & E. 1; *Danford* v. *Taylor* (1869), 20 L. T. 483; *Bew* v. *Harston* (1878), 3 Q. B. D. 454; *Dyson* v. *Mason* (1889), 22 Q. B. D. 351; *Lockwood* v. *Cooper*, [1903] 2 K. B. 428.

(*n*) 4 Bl. Com. 171, speaks of gaming as an offence, but compare *Sherbon* v. *Colebach* (1690), 2 Vent. 175. There does not seem to be any reported case of an indictment of a player in a common gaming-house at common law.

(*o*) That is, within the meaning of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), as to which, see p. 290, *post*.

(*p*) The penalty imposed by the respective Acts which create the offences is a fine not exceeding £50. Those setting up the games in question are liable to a fine not exceeding £200 (Gaming Act, 1738 (12 Geo. 2, c. 28), ss. 2, 3; Gaming Act, 1739 (13 Geo. 2, c. 19), s. 9; Gaming Act, 1744 (18 Geo. 2, c. 34), ss. 1, 2). The games mentioned in the Gaming Act, 1738 (12 Geo. 2, c. 28), and the Gaming Act, 1739 (13 Geo. 2, c. 19), are by those Acts made lotteries, and all pecuniary penalties for offences concerning lotteries are recoverable only at the suit of the Attorney-General (Lotteries Act, 1806 (46 Geo. 3, c. 148), s. 59).

(*q*) Stat. (1541-2) 33 Hen. 8, c. 9, ss. 11, 12. Proceedings must be taken within one year from the offence (*ibid.*, s. 12). The penalty is a fine of 6*s.* 8*d.*, and offenders, without further evidence of "haunting, resorting or playing" within the meaning of the statute than that they were found in the gaming-house, are liable to be bound over (*Murphy* v. *Arrow*, [1897] 2 Q. B. 527).

(*r*) *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, *per* HAWKINS, J.

SECT. 2. Gaming-houses.

in general. What is aimed at is a common gaming-house. It may be common to all who choose to go there or only to the members of a particular class, so that a club may be a common gaming-house (*s*). Since the offence is based upon an injury to the public morals, it would seem to follow that any house kept so as to occasion such an injury will be a common gaming-house, even though the number of persons who frequent it is not large (*t*). Whether it does or does not occasion such an injury must be a question of fact, and the number of persons who use it, and the extent to which they game there, are elements to be considered (*u*).

Evidence.

585. In default of other evidence proving a house to be a common gaming-house, it is sufficient to prove that such house is kept or used for playing at any unlawful games (*v*), and that a bank is kept there by one or more of the players, or that the chances of the game are not alike favourable to all the players, including among the players the banker or person against whom the others play (*x*). That constables engaged in searching the premises are obstructed in their search also affords such *primâ facie* evidence (*y*). Those who give evidence are immune from prosecution (*z*).

Although playing for stakes is that which constitutes gaming (*a*), it is not necessary, on an indictment for gaming or permitting gaming in a common gaming-house, or for certain other offences connected with gaming-houses, to prove that money was played for (*b*). Proof of certain facts, such as that instruments of gaming

(*s*) *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505. And though kept for the double purpose of an ordinary social club and a gaming-house, it is none the less a gaming-house. See title CLUBS, Vol. IV., p. 435.

(*t*) The house may be a nuisance because it brings together large numbers of disorderly persons, which cannot but be inconvenient to the neighbourhood (2 Hawk. P. C. Ch. 32, s. 4, sub-s. 6 (8th ed., p. 693)); but it is also a nuisance *per se* (*ibid.*, sub-s. 7); and see *R.* v. *Rice and Wielton* (1866), L. R. 1 C. C. R. 21.

(*u*) *R.* v. *Rogier* (1823), 2 Dow. & Ry. (K. B.) 431; *R.* v. *Taylor* (1824), 3 B. & C. 502; *Jenks* v. *Turpin*, *supra*; and see title NUISANCE.

(*v*) See p. 285, *ante*. The expression "unlawful games" also occurs in the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 4, and its meaning is considered p. 290, *post*.

(*x*) The operation of an automatic machine which by compressing and releasing a spring, projected pennies put in it into one or other of seven compartments, the penny being returned if it landed in one of two, the operator being only entitled to a prize if the penny landed in the centre compartment, was held to be such a game, inasmuch as the proprietor of it backed his chances against the players and the chances were in his favour. The use of this machine in a shop was evidence of the shop being kept as a common gaming-house, and the proprietor was convicted accordingly (*Fielding* v. *Turner*, [1903] 1 K. B. 867; *Thompson* v. *Mason* (1904), 90 L. T. 649; *Roberts* v. *Harrison* (1909), 101 L. T. 540).

(*y*) Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 2. As to the offence of obstructing the search, see p. 291, *post*.

(*z*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 9; Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), ss. 5, 6.

(*a*) *R.* v. *Ashton* (1852), 1 E. & B. 286; and compare *Lockwood* v. *Cooper*, [1903] 2 K. B. 428, where the players competed for prizes provided by non-players, and the transaction was held not to be gaming; see p. 267, *ante*.

(*b*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 5. But play for money must be

or the means of concealing them were found upon the premises, affords presumptive evidence that the house is a common gaming-house (*c*).

SUB-SECT. 2.—*Offences connected with Gaming-houses* (*d*).

Offences.

586. Any person, being the owner, occupier, or having the use of any house, room, or place (*e*), who opens, keeps, or uses the same for the purpose of unlawful gaming, or any person who, being the owner or occupier of any house or room, knowingly and wilfully permits the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any way assisting in conducting the business of any house, room, or place, opened, kept, or used for the purpose aforesaid, and any person who advances or furnishes any money for the purpose of gaming with persons frequenting such house, room, or place, may be convicted and fined or imprisoned (*f*).

Keeping or using a place for unlawful gaming.

587. The first offence, therefore, is the keeping or using any place for the purpose of unlawful gaming. An isolated instance of gaming at an unlawful game upon premises is not sufficient evidence of the premises being kept and used for the purpose (*g*). Any person who appears or behaves himself as the master or as one having the care or management of such a place is deemed to be the keeper thereof (*h*). The offence of keeping or using a gaming-house can only be committed by one who is the owner, occupier, or person having the use of it, which means one who has the use, as a licensee to carry on the business, and does not include a person who uses the place in the sense of merely going in to avail himself

proved where the offence charged is that of permitting gaming upon licensed premises (*Lockwood* v. *Cooper*, [1903] 2 K. B. 428).

(*c*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 8; Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 2.

(*d*) See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 545.

(*e*) Similar words are to be found in the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1; and the cases upon the meaning of a "place" will be found at p. 295, *post*. As to gaming in clubs, see title CLUBS, Vol. IV., p. 435.

(*f*) Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 4. The penalty on summary conviction is a fine not exceeding £500, or twelve months' imprisonment with or without hard labour. An appeal lies to quarter sessions (*ibid.*, s. 10). As to application of the penalty, see *ibid.*, s. 8, and *Wray* v. *Ellis* (1858), 5 Jur. (N. S.) 624, and as to application in quarter sessions boroughs, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 221. With one exception, that of playing or gaming in a common gaming-house, all offences connected with gaming-houses which are dealt with by earlier statutes are covered by this statute. The earlier statutes, though not repealed, are therefore not referred to in detail. They are stat. (1541-2) 33 Hen. 8, c. 9, ss. 11, 12, as amended by the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 1 (for the effect of the amendment, see *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, and pp. 284 *et seq.*, *ante*, imposing penalties on keepers and frequenters of gaming-houses; Gaming Act, 1738 (12 Geo. 2, c. 28), s. 2; Gaming Act, 1739 (13 Geo. 2, c. 19), s. 9; and Gaming Act, 1744 (18 Geo. 2, c. 34), s. 1, which impose penalties upon the maintainers of the games therein mentioned; the last-mentioned statute also makes it an offence to permit play at the games mentioned in it.

(*g*) *R.* v. *Davies*, [1897] 2 Q. B. 199, C. C. R.; compare *Jayes* v. *Harris* (1908), 99 L. T. 56; and see title INTOXICATING LIQUORS.

(*h*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 8.

SECT. 2. Gaming-houses.

of the business which happens to be carried on there (*i*). Therefore the players cannot be convicted under this section (*j*).

"Unlawful gaming."

588. The house must be kept for the purpose of "unlawful gaming." There is no statement in the Act (*k*) itself as to what is intended by this expression, but it seems that keeping a house for unlawful gaming means keeping it for gaming at games unlawful in themselves or as a common gaming-house (*l*).

Permitting the use of a place.

589. The next offence is that of permitting a house to be kept or used by a licensee as a common gaming-house, and can be committed only by the owner or occupier, the person having the use of it as a licensee to carry on the business not being mentioned (*m*).

Managing the business.

590. The third offence is that of managing, or assisting in conducting the business of, a gaming-house. The committee of a gambling club, having the usual powers of club committees over the admission of members, and of making rules for the conduct of the club, assist in the management of it (*n*), while those who merely play do not (*o*).

(*i*) *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, *per* A. L. SMITH, J. Presumably the word "use" is employed in this same sense throughout the section. For the meaning of similar words contained in the Betting Act, 1853 (16 & 17 Vict. c. 119), see p. 295, *post*.

(*j*) *Jenks* v. *Turpin*, *supra*.

(*k*) Gaming Houses Act, 1854 (17 & 18 Vict. c. 38).

(*l*) See *Jenks* v. *Turpin*, *supra*. The steps by which this result is reached appear to be these: Gaming at unlawful games is itself unlawful. Games may be unlawful either in themselves or by reason that, though lawful in themselves, they are being played in a common gaming-house. Gaming at games unlawful in themselves is clearly unlawful gaming within the section, but in order to say that gaming at other games is unlawful one must first ascertain that they are being played in a common gaming-house. Having done so, the gaming is found to be unlawful. If the section had imposed penalties upon persons who unlawfully kept a house etc. for the purposes of gaming, the necessity for this somewhat circuitous line of reasoning would have been avoided, and it is submitted that that is the real intention of the section. A. L. SMITH, J., was, however, of opinion (compare his judgment in *Jenks* v. *Turpin*, *supra*, with that of HAWKINS, J.) that, in addition to the reasons given above, gaming was also unlawful if excessive stakes were played for. HAWKINS, J., was of opinion (*ibid.*, at pp. 522, 524) that, since the repeal of the statutory provisions expressly directed against excessive gaming (in the stat. (1664) 16 Car. 2, c. 7; the Gaming Act, 1710 (9 Ann. c. 19); and the Gaming Act, 1744 (18 Geo. 2, c. 34)), it was no longer an offence, notwithstanding the opinion of ABBOTT, C.J. (afterwards Lord TENTERDEN), in *R.* v. *Rogier* (1823), 2 Dow. & Ry. (K. B.) 431, expressed before the partial repeal of the Gaming Act, 1710 (9 Ann. c. 19). So far as the section under discussion is concerned, the question seems to be of little importance, because if the illegality of the gaming in a particular case lies only in its excess, it would be difficult, if not impossible, to prove that such illegality was the purpose for which the house was kept. It is suggested that the practical relation of excessive gaming to this section is that the excess affords evidence of a nuisance at common law; see observations of HAWKINS, J., in *Jenks* v. *Turpin*, *supra*, at p. 525.

(*m*) Compare the Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3, and the cases decided upon its construction cited at pp. 295, 296, *post*; and the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92); see note (*m*), p. 286, *ante*, and cases there cited.

(*n*) *Jenks* v. *Turpin*, *supra*.

(*o*) *Ibid.*; compare, however, *Derby* v. *Bloomfield* (1904), 68 J. P. 391, where one who bought a bank at an unlawful game was convicted of assisting in the management.

SECT. 2. Gaming-houses.

Irrespective of the foregoing provisions, for a licensed person to suffer any gaming or any unlawful game to be carried on on his premises is an offence (*p*); and money lent by him for the purpose cannot be recovered (*a*). To constitute the offence of "suffering" gaming there must be actual knowledge or connivance on the part of the licensee or on the part of a servant in charge of the premises (*b*). But suffering bets to be made on the licensed premises is not within the prohibition (*c*).

Licensed houses.

SUB-SECT. 3.—*Search Warrants.*

Search warrants.

591. Justices, on the sworn testimony of an informer that he has reason to suspect that a place is used as a common gaming-house, or in the metropolis (*d*) the Commissioners of Police, on the report in writing of a superintendent of the Metropolitan Police to a similar effect, have power to issue a warrant or order authorising constables to search the suspected place and arrest persons found therein (*e*). The order of the Commissioners may also authorise the seizure of instruments of gaming (*f*), and money and securities found on the premises. Those who obstruct the search commit an offence (*g*).

Part III.—Betting and Betting-houses.

SECT. 1.—*Offences connected with Betting.*

Betting in a public place.

592. Every person playing or betting by way of gaming or wagering in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such gaming or wagering, at any game or pretended game of chance (*h*), is punishable as a rogue and vagabond, or by fine (*i*).

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79; and see title INTOXICATING LIQUORS.

(*a*) *Foot* v. *Baker* (1843), 5 Man. & G. 335.

(*b*) *Bosley* v. *Davies* (1875), 1 Q. B. D. 84; *Somerset* v. *Hart* (1884), 12 Q. B. D. 360; *Redgate* v. *Haynes* (1876), 1 Q. B. D. 89; *Bond* v. *Evans* (1888), 21 Q. B. D. 249.

(*c*) *Keep* v. *Stevens* (1909), 100 L. T. 491.

(*d*) As to the practice in the city of London, see title METROPOLIS.

(*e*) Gaming Act, 1845 (8 & 9 Vict. c. 109), ss. 3, 6, 7. Persons found therein, without further evidence that they were "haunting, resorting, or playing" within the meaning of stat. (1541-2) 33 Hen. 8, c. 9, s. 14, may be bound over "no more to play, haunt or exercise from thenceforth" in any gaming-house (*Murphy* v. *Arrow*, [1897] 2 Q. B. 527). As to the meaning of "found therein," see *Davis* v. *Sly* (1910), 26 T. L. R. 460.

(*f*) It seems that betting slips and books are not instruments of gaming within the meaning of this section (*R.* v. *Willcock* (1889), 54 J. P. 9, and see the report of a prosecution at Bow Street Police Court (1899), 63 J. P. 38; and compare *Lester* v. *Quested* (1901), 85 L. T. 487).

(*g*) Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 1. The penalty on summary conviction is not exceeding £100, or six months' imprisonment, with or without hard labour. For the application of penalties, see *ibid.*, s. 8.

(*h*) It must be alleged and proved that the gaming was at a game or pretended game of chance (*Ridgeway* v. *Farndale*, [1892] 2 Q. B. 309).

(*i*) Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3. The

SECT. 1. Offences connected with Betting.

A railway carriage, while used and travelling upon the line for the conveyance of passengers, is such a public place (*k*); but not if the carriage is not being so used (*l*). In the case of a highway it is sufficient to allege the offence to have taken place upon the highway without alleging that a vehicle in which it took place was a public vehicle (*m*); and private property to which the public are in the habit of resorting, although not as of right, is a public place (*n*).

Instruments of gaming.

593. Neither money passing as a deposit on a bet (*o*) nor betting slips accompanying it are "used as instruments or means of gaming" (*p*). But a machine operated by persons desirous of betting, which records the amount staked on each particular horse in a race, and the total of all bets made, in order that such total, less a percentage, may be distributed among those who had betted upon the winning horse, is such an instrument. Further, inasmuch as the sum received by any winner is dependent upon the number who share with him and upon the number of bettors who have proved unsuccessful, the game is a game of chance (*q*).

Betting in libraries etc.

594. Betting in public libraries (*r*) and certain other public institutions (*s*) to the annoyance or disturbance of any person using them is also punishable.

Frequenting streets etc. for purposes of betting.

595. Persons frequenting (*t*) or loitering in streets or public places on behalf either of themselves or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager (*a*), or paying, or receiving, or settling bets, are liable

offender is liable to be committed, as a rogue and vagabond, before the justice for not exceeding fourteen days with hard labour, or by two justices for not exceeding three calendar months, with hard labour, and to forfeiture of the instruments of gaming (Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4, as modified by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20), or to a fine not exceeding £25. But he is also liable under the Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3, to a fine not exceeding 40*s.* for a first offence and not exceeding £5 for subsequent offences. As to highways and streets generally, see title HIGHWAYS, STREETS, AND BRIDGES.

(*k*) *Langrish* v. *Archer* (1882), 10 Q. B. D. 44.

(*l*) *Re Freestone* (1856), 1 H. & N. 93.

(*m*) *Ex parte Grant* (1857), 5 W. R. 289. The question arose under the Vagrancy Act, 1824 (5 Geo. 4, c. 38), s. 4, which, so far as is material, is in the same terms.

(*n*) *Turnbull* v. *Appleton* (1881), 45 J. P. 469.

(*o*) *Hirst* v. *Molesbury* (1870), L. R. 6 Q. B. 130.

(*p*) *Lester* v. *Quested* (1901), 85 L. T. 487.

(*q*) *Tollett* v. *Thomas* (1871), L. R. 6 Q. B. 514. The machine is known as a "pari mutuel," and is in common use on racecourses in France and some of the British Colonies.

(*r*) Libraries Offences Act, 1898 (61 & 62 Vict. c. 53), s. 2. Penalty, on summary conviction, a fine not exceeding 40*s.*

(*s*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 4.

(*t*) In construing a local bye-law which prohibited persons from frequenting a public place for the purpose of betting, it was held that being in the place in question sufficiently long to effect the purpose constituted frequenting (*Airton* v. *Scott* (1909), 100 L. T. 393).

(*a*) Frequenting a street for the purpose of doing that which is a substantial step in any of the transactions named is sufficient to constitute the offence. Thus, distributing handbills to the public, containing the terms on which another offers to bet, is within the statute (*Dunning* v. *Swetman*, [1909] 1 K. B. 774).

to punishment (*b*), and when it is proved that any person while committing the offence had any betting transaction with a person under the age of sixteen years a severer punishment is imposed (*c*).

"Street."
"Public place."

The word "street" includes any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not; and the words "public place" include any public park, garden, or sea beach, and any uninclosed ground to which the public for the time being have unrestricted access, and also includes every inclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein (*d*), but do not extend to any ground, used for the purpose of a racecourse for racing with horses, or adjacent thereto, on the days on which races take place (*e*).

Prohibition by bye-law.

Betting in streets and public places may also be prohibited by bye-laws made in that behalf by local authorities, and such bye-laws are valid (*f*).

Metropolitan streets.

In the metropolis, three or more persons assembled together for the purpose of betting in any street are deemed to be obstructing it, and can be dealt with accordingly (*g*).

Sending betting circulars to infants.

596. Sending circulars to infants inviting them to bet with any person, or to apply for information to any person as to any wager or as to any contingency upon which betting commonly takes place, is a misdemeanour. The onus of proving that the circular was sent without his knowledge is put upon the person indicated in the circular as offering to bet or give information, and *primâ facie*

(*b*) Street Betting Act, 1906 (6 Edw. 7, c. 43), s. 1 (1). Penalty for a first offence, a fine not exceeding £10, recoverable summarily; for a second offence, a fine not exceeding £20, recoverable summarily; for a third or subsequent offence, on indictment, a fine not exceeding £50, or imprisonment, with or without hard labour, for a term not exceeding six months without the option of a fine, or on summary conviction a fine not exceeding £30, or imprisonment, with or without hard labour, for a term not exceeding three months, without the option of a fine. For an offence to be a second offence, the first offence must have been under this Act (*R.* v. *Stone, Ex parte Seton* (1908), 99 L. T. 88). See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 551.

(*c*) Street Betting Act, 1906 (6 Edw. 7, c. 43), s. 1 (1) (c). The penalty is as for a third offence, see note (*b*), *supra*.

(*d*) Street Betting Act, 1906 (6 Edw. 7, c. 43), s. 1 (4). It has been held in Scotland that it is immaterial that the right of access is restricted or, *semble*, non-existent, if access in fact is unrestricted (*Breslin* v. *Thomson*, [1910] S. C. (J.) 5). As to the meaning of "public place," compare *Woods* v. *Lindsay* (1910), 47 Sc. L. R. 774. The expressions "street" and "public place" are alternative, and a person cannot be convicted generally upon an information for loitering in a "street" or "public place" (*Lang* v. *Walker* (1909), 47 Sc. L. R. 162); compare *Queen* v. *Wilson*, [1910] S. C. (J.) 62; and see *Vallance* v. *Campbell*, [1909] S. C. (J.) 9; *Hasson* v. *Neilson*, [1908] S. C. (J.) 57.

(*e*) Street Betting Act, 1906 (6 Edw. 7, c. 43), s. 2. As to when ground is used for the purpose of a racecourse, see *Stead* v. *Aylcroyd*, [1911] 1 K. B. 57; and title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*f*) *Burnett* v. *Berry*, [1896] 1 Q. B. 641; *White* v. *Morley*, [1899] 2 Q. B. 34; *Jones* v. *Walters* (1898), 78 L. T. 167. As to bye-laws of local authorities, see title LOCAL GOVERNMENT.

(*g*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 23. The penalty is a fine not exceeding £5, recoverable as provided in s. 27 (*ibid.*).

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evidence that he knew the recipient to be a minor is afforded by the circular being addressed to a university (*h*) or other place of education (*i*).

SECT. 2.—*Betting-houses.*

Prohibition against opening or keeping a place used for betting.

597. No house, office, room, or other place (*j*) may be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is a common nuisance and contrary to law (*k*).

Places so kept or used, which may for the sake of brevity be described as betting-houses, are declared to be common gaming-houses (*l*).

Penalties.

598. A penalty (*m*) is imposed upon the owner or occupier or person using a betting-house, and upon the owner or occupier who

(*h*) Where the address used is one which may or may not be within the university, *e.g.*, the address of licensed lodgings, there is no presumptive evidence that the person charged knew the addressee to be an infant, unless there is proof that he knew the address to be within the university (*Milton* v. *Studd*, [1910] 2 K. B. 118).

(*i*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4); see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 552. As to minors, generally, see title INFANTS AND CHILDREN.

(*j*) As to what constitutes a "place," see p. 295, *post*.

(*k*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1. See *R.* v. *Mortimer*, [1911] 1 K. B. 70, C. C. A., for the evidence of user that will suffice to support a conviction. In this case postal orders were deemed to be money or valuable things. Places contravening the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1, are by s. 2 (*ibid.*) deemed to be common gaming-houses within the meaning of the Gaming Act, 1845 (8 & 9 Vict. c. 109). The Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 11, 12, contains provisions as to the issue and execution of search warrants similar to those in the Gaming Act, 1845 (8 & 9 Vict. c. 109) (as to which see p. 291, *ante*). The warrants under this Act may authorise the seizure of race cards and all other documents relating to racing or betting, but not money found on the premises, and if money is taken it can be recovered (*Gordon* v. *Metropolitan Police Chief Commissioner*, [1910] 2 K. B. 1080, C. A.). All penalties under this Act are summarily enforceable, and a right of appeal is provided under both Acts; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 548—550. As to betting in clubs, see title CLUBS, Vol. IV., p. 435.

(*l*) The Betting Act, 1853 (16 & 17 Vict. c. 119), s. 2, makes betting-houses subject to the provisions of the Gaming Act, 1845 (8 & 9 Vict. c. 109). For gaming-houses, see p. 287, *ante*.

(*m*) A penalty of not exceeding £100, or six months' imprisonment, with or without hard labour (Betting Act, 1853 (16 & 17 Vict. c. 119), s. 3), is imposed on the owner, occupier etc., and a penalty of not exceeding £50, or three months'

knowingly permits the use of it as a betting-house, and also upon the person having the care or management of or in any way assisting in conducting the unlawful business carried on there (*n*), or receiving deposits upon bets (*o*).

The "place" and "use" intended.

599. The "place" and the "use" to which it is put are conceptions very closely connected, for the localisation of the business of betting underlies them both. Once it is established that a business of betting is carried on, if then it is found that the business is localised so that people may fairly be said to resort to the place where it is carried on, the place is sufficiently defined (*p*). And as the "localisation" is brought about by the kind of use to which the place is put, its presence is a question of fact (*q*).

"Use" must import possession or control.

600. But the use is not of the kind prohibited unless it imports some measure of possession or control, for the "person using" is one who, although the designations "owner," "occupier," or "keeper" do not apply to him, is nevertheless some other person who is analogous to, and is of the same genus as, the owner, occupier, or keeper, and who bets or is willing to bet with persons who resort to his "place." He is, therefore, also a different person from those who merely resort to the place (*r*), so that members of a club who

imprisonment, with or without hard labour, is imposed on one who receives deposits. One-half of any pecuniary penalty adjudged to be paid under the Act is payable to an informer (Betting Act, 1853 (16 & 17 Vict. c. 119), s. 9), but the magistrate has a discretion to deprive him of his share (*Hawke* v. *Mackenzie* (No. 3), [1902] 2 K. B. 234).

(*n*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 3. The word "unlawful" does not appear in the section, but the manager cannot be convicted, even though the place of which he is manager is kept in contravention of the section, unless he is manager of the unlawful business (*R.* v. *Cook* (1884), 13 Q. B. D. 377). In the light of later decisions the place in that case does not seem to have been "used" for the prohibited purposes, but this, it is submitted, does not affect the decision. A separate penalty is imposed by the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79, upon any licensed person who opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the Betting Act, 1853 (16 & 17 Vict. c. 119). Although the offender is liable to prosecution under either of these Acts, the penalties are not concurrent (*Sims* v. *Pay* (1889), 58 L. J. (M. C.) 39).

(*o*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 4.

(*p*) *Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143.

(*q*) *Ibid.*; *Brown* v. *Patch*, [1899] 1 Q. B. 892. If the place in question is a house, office, or room, one element of localisation, namely, a defined area, is present, but the question remains whether the use of it is such that not only can the business be said to be localised there, but some sort of possession or control over it inferred. If, on the other hand, the place in question is not physically defined, the use of a stool, a conspicuous umbrella, or other apparatus, affords evidence of localisation; so, if the proper inference from the kind of use is that it indicates a place at which betting is carried on, as distinguished from a person who is prepared to bet with anyone, the place in question is a betting-house (*per* CHANNELL, J., *ibid.*, at p. 899).

(*r*) *Powell* v. *Kempton Park Racecourse Co.*, *supra*. Thus, when a person occupies in fact, though not of right or by permission, a place to the exclusion of others, as by planting a stool or other structure upon it (*Bows* v. *Fenwick* (1874), L. R. 9 C. P. 339; *Gallaway* v. *Maries* (1881), 8 Q. B. D. 275), or by the habitual use of it (*McInaney* v. *Hildreth*, [1897] 1 Q. B. 600, 605; *Liddell* v. *Lofthouse*, [1896] 1 Q. B. 295; *R.* v. *Humphrey*, [1898] 1 Q. B. 875, C. C. R.; *R.* v. *Corrie and Watson* (1904), 68 J. P. 294, C. C. R.; *R.* v. *Russell* (1905), 69 J. P. 247, C. C. R.), the very nature of his acts may import some sort of possession in, or control over, the particular place which he occupies (*Brown* v

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resort to it for the purpose of betting among themselves do not thereby make the club premises a betting-house (*s*).

But if the use to which a person puts a place apparently differs from that which those who resort to it enjoy only in its purpose and not its kind (*t*), it is necessary, in order to prove the offence of using a place, to show that the particular use of it was made by the permission of the owner (*a*), or of someone who assists in the management of the place in question (*b*).

The kind of betting intended.

601. The kind of betting which is prohibited is betting, on sporting contingencies, either with persons resorting to the place in question, or betting by receiving deposits there (*c*). If betting of the former kind is alleged, physical resort must be proved (*d*), although the betting need not be for ready money (*e*). If, on the other hand, the receipt of deposits is relied upon, there need be no physical resorting (*f*), nor is it necessary to prove the receipt of the deposit at the house itself. It is sufficient if any material step towards the ultimate receipt of the deposit is taken at the place in question.

Coupon competitions.

It is upon this principle that offices, from which coupons for coupon competitions are issued, are said to be used for the purpose of receiving deposits, which are made when receiving the coupons,

Patch, [1899] 1 Q. B. 892; *R.* v. *Deaville* (*Albert*), *R.* v. *Deaville* (*John*), *R.* v. *Simpson*, [1903] 1 K. B. 468, C. C. R.). *Secus*, if there is only an isolated instance of betting (*Jayes* v. *Harris* (1908), 99 L. T. 56; and see *M'Connell* v. *Brennan*, [1908] 2 I. R. 411). On the other hand, although he may have localised the business, in the sense that he has identified it with a particular locality, and yet cannot be said to have possessed himself of or to exercise control over the locality, or any particular place within it, he does not use it within the meaning of the Act (*Brown* v. *Patch*, *supra*; *R.* v. *Deaville* (*Albert*), *R.* v. *Deaville* (*John*), *R.* v. *Simpson*, *supra*; *Snow* v. *Hill* (1885), 14 Q. B. D. 588).

(*s*) *Oldham* v. *Ramsden* (1875), 44 L. J. (C. P.) 309; *Downes* v. *Johnson*, [1895] 2 Q. B. 203. Certain members may, however, have that kind of exclusive control of part of the premises which constitutes a use which is analogous to occupation. In such a case they are liable for using a betting-house, and those members who resort to it are liable to the consequences of frequenting a common gaming-house (*R.* v. *Corrie and Watson* (1904), 68 J. P. 294, C. C. R.; *Murphy* v. *Arrow*, [1897] 2 Q. B. 527); as to which, see note (*q*), p. 287, *ante*.

(*t*) As in *Whitehurst* v. *Fincher* (1890), 62 L. T. 433.

(*a*) *Hornsby* v. *Raggett*, [1892] 1 Q. B. 20; *Belton* v. *Busby*, [1899] 2 Q. B. 380; *Tromans* v. *Hodkinson*, [1903] 1 K. B. 30; *R.* v. *Deaville* (*Albert*), *R.* v. *Deaville* (*John*), *R.* v. *Simpson*, *supra*. This latter decision, which is expressly based upon *Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143, must not, it is submitted, be taken to lay down any wider proposition than that, in the absence of other sufficient evidence of the kind of use contemplated by the statute, permission by the owner must be proved.

(*b*) *Buxton* v. *Scott* (1909), 100 L. T. 390. Though the knowledge, from which the permission may be inferred, is that of the manager only, the "person using" can be convicted. The manager for this purpose need not, it seems, be the manager of the unlawful business; compare, however, *R.* v. *Cook* (1884), 13 Q. B. D. 377, and note (*n*), p. 295, *ante*.

(*c*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1.

(*d*) *R.* v. *Brown*, [1895] 1 Q. B. 119, C. C. R., so that, if resorting is relied upon in proof that the place is kept for a prohibited purpose, it is not enough to prove the receipt there of letters relating to bets.

(*e*) *Bond* v. *Plumb*, [1894] 1 Q. B. 169.

(*f*) *R.* v. *Brown*, *supra*.

although the deposits are actually received elsewhere, even out of the jurisdiction; the issue of the coupons being a material step towards the ultimate receipt of the deposits (*g*). But though neither "resorting" nor "deposit" is alleged, the purpose for which the place is kept may be shown by other facts (*h*).

Deposit.

The deposit must be received by or on behalf of the owner, occupier, keeper, or person using the place (*i*), and the use must be a physical use (*k*), so that where the use relied upon is the issue of coupons, or of a newspaper containing coupons or advertisements of coupon competitions, the person who is alleged to have used must, it seems, be shown to have a closer connection with the newspaper in which the coupons or advertisements are issued than a mere advertiser would have (*l*). But if the paper is issued solely or substantially with the object of furthering the coupon competitions, its issue constitutes a use, by the person managing the competition, of the office from which the paper is issued, and the owner or occupier of the office permits the use of the office, and also opens, keeps, and uses it for the purpose of an illegal use (*m*).

Acts not amounting to user.

602. On the other hand, merely using a place for the purpose of paying bets which have been made elsewhere is not using it for any of the prohibited purposes (*n*), nor is it an offence for the owner or occupier of a place to receive money which has been deposited with another elsewhere, as the consideration for that other's promise to pay on a contingency (*o*). So also one who organises a sweepstake and receives the subscriptions at the house which he occupies, but who does not himself subscribe, does not use the house for a prohibited purpose (*p*).

(*g*) *Stoddart* v. *Hawke*, [1902] 1 K. B. 353; *Lennox* v. *Stoddart*, *Davis* v. *Stoddart*, [1902] 2 K. B. 21, C. A.

(*h*) *E.g.*, by showing that it was advertised as a betting-house (*R.* v. *Brown*, [1895] 1 Q. B. 119, C. C. R.).

(*i*) Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3.

(*k*) *Mackenzie* v. *Hawke*, [1902] 2 K. B. 216, *per* CHANNELL, J., at p. 224.

(*l*) *Ibid.*

(*m*) *Stoddart* v. *Hawke*, *supra*; *Mackenzie* v. *Hawke*, *supra*.

(*n*) *Bradford* v. *Dawson*, [1897] 1 Q. B. 307.

(*o*) *Davis* v. *Stephenson* (1890), 24 Q. B. D. 529.

(*p*) *R.* v. *Hobbs*, [1898] 2 Q. B. 647, C. C. R. The defendant was not a subscriber to the sweepstake, and there was no contract between him and the subscribers in the nature of a wager: it was further decided that the contingency upon which the prizes were to be distributed was not the result of a race, but of the drawing, which might equally well have taken place after the race had been run (compare, however, *R.* v. *Stoddart*, [1901] 1 K. B. 177, C. C. R., where prizes were distributed among those who filled in coupons with the names of the winning horses in races): the competitors could procure one coupon by purchasing a newspaper containing it, and further coupons at one shilling apiece, the money so paid being alleged to be the competitor's stake. Held, that even if the transaction was not strictly a bet, it fell within the latter part of the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1, and further that the contingency was a horse race, though skill in guessing entered into it (compare also *Caminada* v. *Hulton* (1891), 60 L. J. (M. C.) 116; distinguished in *R.* v. *Stoddart*, *supra*, upon the ground that the promise of a prize was not the only consideration for the payment made by the competitor). It seems difficult to distinguish upon principle the event in

SECT. 2. Betting-houses.

Receiving deposits on bets.

603. It is an offence for the owner or occupier of a betting-house, or any person acting on his behalf, or anyone having the management of or assisting in the business of a betting-house, directly or indirectly to receive a deposit on a bet of the kind prohibited, or to give any acknowledgment, note, security, or draft, on the receipt of the deposit, as security for the payment of the bet (*q*). Such deposit is deemed to have been received to the use of the person making it (*r*).

Advertising a betting-house.

604. When any placard or advertisement is exhibited or published whereby it is made to appear that any house, office, room, or place is kept or used for the purpose of betting with persons resorting thereto or of exhibiting betting lists, or is exhibited or published with intent to induce persons to resort thereto for the purpose of betting (*s*); and also (*t*) when any letter, telegram, circular, placard, or advertisement is sent, exhibited, or published, whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any bet or wager to be made in a betting-house upon sporting events (*a*), or will make on behalf of any other person any

R. v. *Hobbs*, [1898] 2 Q. B. 647, C. C. R., from that in *R.* v. *Stoddart*, [1901] 1 K. B. 177; C. C. R. If in the former the drawing had in fact taken place after the race, the drawing and not the race would have been the determining factor; but since it preceded the race it is difficult to see how the drawing was the event by which the winner was in fact ascertained. In *R.* v. *Stoddart*, *supra*, the exercise of skill in filling in the name of a probable winner seems parallel to the drawing in *R.* v. *Hobbs*, *supra*. Both operations put the competitor in a position to win a prize, subject always to the uncertainty of the race. It was in both cases by the determination of this uncertainty that the winner was to be ascertained. It is submitted that the two cases are not reconcilable upon this point, and that *R.* v. *Stoddart*, *supra*, is to be preferred.

(*q*) Penalty not exceeding £50, or three calendar months' imprisonment (Betting Act, 1853 (16 & 17 Vict. c. 119), s. 4). A deposit against bets still to be made is within the statute (*R.* v. *Mortimer*, [1911] 1 K. B. 70, C. C. A.).

(*r*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 5. It is to be observed that the "person using" the place is not mentioned in the preceding section as in the earlier sections, an omission which renders ambiguous the expression "any such person aforesaid" occurring in this section (see p. 273, *ante*). The authorities are in conflict as to whether "the person using" comes within s. 5, but the balance appears to be in favour of the view that he does not (*Doggett* v. *Catterns* (1865), 19 C. B. (N. S.) 765, Ex. Ch., as explained in *R.* v. *Preedy* (1888), 17 Cox, C. C. 433; *Hawke* v. *Dunn*, [1897] 1 Q. B. 579; *McInaney* v. *Hildreth*, [1897] 1 Q. B. 600, *per* HAWKINS, J.; *Liddell* v. *Lofthouse*, [1896] 1 Q. B. 295, *per* LINDLEY, L.J., at p. 297; *Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, C. A., *per* A. L. SMITH, L.J., at p. 281; *per* RIGBY, L.J., at p. 294; compare, however, *Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143, *per* Lord HALSBURY, L.C., at p. 165; and *Vogt* v. *Mortimer* (1906), 22 T. L. R. 763; and see *R.* v. *Worton*, [1895] 1 Q. B. 227.

(*s*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 7.

(*t*) Betting Act, 1874 (37 & 38 Vict. c. 15), s. 3.

(*a*) *Ibid.* The words of the statute are ". . . with respect to any such bet or wager or any such event or contingency as is mentioned in" the Betting Act, 1853 (16 & 17 Vict. c. 119), and does not prohibit the advertisement of any other kind of betting (*Cox* v. *Andrews* (1883), 12 Q. B. D. 126). In Scotland, however, it has been held that the bets referred to in the Betting Act, 1874 (37 & 38 Vict. c. 15), are not confined to those to be made in a betting-house, so long as they are bets upon the contingencies named in the Betting Act, 1853 (16 & 17 Vict. c. 119). But neither the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 7, nor the

such bet or wager, or with intent to induce any person to apply to any house, office, room, or place, or to any person, with the view of obtaining any information or advice for the purpose of such bet or wager, or with respect to any such event; or inviting any person to take any share in or in connection with any such bet or wager, the person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, is subjected to a penalty (*b*). But it must appear, by reasonable intendment from the advertisement itself, that the betting which is advertised is of the prohibited kind (*c*).

Inviting persons to resort to a betting-house.

Any person who on behalf of the owner or occupier of a betting-house invites other persons to resort to it for the purpose of betting is also subjected to a penalty (*d*).

Part IV.—Lotteries.

SECT. 1.—*Definition.*

Distribution of stakes by lot.

605. A lottery has been described as a scheme for distributing prizes by lot or chance (*e*). In its simplest form the adventurers contribute to a fund which they agree among themselves shall be unequally divided upon the happening of an agreed event (*f*). A stranger to this contract does not, by acquiring from a contributor the contributor's chances of a prize, establish any privity of contract between himself and the other contributors or the stakeholder (*g*). He who organises such a scheme may or may not be a party to the agreement between the adventurers, so that in considering whether a lottery is set up or maintained it is unnecessary to consider whether or not the organiser is to make a

Betting Act, 1874 (37 & 38 Vict. c. 15), are confined to advertisements of bets to be made with persons resorting to betting-houses, but cover the transactions by deposit aimed at by the latter part of the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1 (*Hawke* v. *Mackenzie* (Nos. 1 and 2), [1902] 2 K. B. 225), and would therefore cover cases where the deposit is only constructively made at the betting-house, as in *Stoddart* v. *Hawke*, [1902] 1 K. B. 353; compare *R.* v. *Andrews, Schotz and Luggar* (1910), 74 J. P. 255; see also *Agnew* v. *Morley*, [1909] S. C. (J.) 41.

(*b*) Betting Act, 1874 (37 & 38 Vict. c. 15), s. 3; Betting Act, 1853 (16 & 17 Vict. c. 119), s. 7. The penalty is not exceeding £30, or two months' imprisonment, with or without hard labour.

(*c*) *Ashley and Smith, Ltd.* v. *Hawke* (1903), 89 L. T. 538. It seems to follow that if the betting which is advertised, though of the same kind as that prohibited, is carried on wholly beyond the jurisdiction, the publication of the advertisement would not be an offence. But see p. 296, *ante*, as to a material step towards the receipt of the deposit taking place within the jurisdiction.

(*d*) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 7. The penalty is not exceeding £30, or two months' imprisonment, with or without hard labour.

(*e*) *Taylor* v. *Smetten* (1883), 11 Q. B. D. 207; *Barclay* v. *Pearson*, [1893] 2 Ch. 154.

(*f*) This is the form of an ordinary sweepstake, which is a lottery (*Allport* v. *Nutt* (1845), 1 C. B. 974; *Gatty* v. *Field* (1846), 9 Q. B. 431; *Mearing* v. *Hellings* (1845), 14 M. & W. 711; *R.* v. *Hobbs*, [1898] 2 Q. B. 647, C. C. R.; *Hardwick* v. *Lane*, [1904] 1 K. B. 204).

(*g*) *Jones* v. *Carter* (1845), 8 Q. B. 134.

SECT. 1. **Definition.**

profit out of the subscriptions (*h*). The agreement between the adventurers, when the lottery takes this simple form, seems to be a wager between them, for all stand to lose the amount of their subscriptions in favour of the winner. But though this element of wager does not appear ever to be wholly absent (*i*), yet it need not be common to all the adventurers; it is enough that some of them stand to lose (*k*). Therefore, if some of the adventurers have, however indirectly, contributed to the fund out of which the prizes are to be paid, they risk the amount of their contributions, and in such a case it is immaterial that others who have contributed nothing may win the prize (*l*).

The element of wager.

Conversely, it is not essential that the fund out of which the prizes are provided should consist only of sums contributed by the adventurers (*m*). Nor does the fact that every adventurer in any event obtains some or even full (*n*) value for his subscription prevent the scheme from being a lottery (*o*). But it seems that when the chances of a prize are obtained wholly gratuitously, and when, therefore, none of the adventurers risks anything, the scheme would not be a lottery (*p*).

The distribution must depend wholly upon chance, and if the exercise of skill on the part of the competitors can, and does, contribute to success, the scheme is not a lottery, although chance may play a part in it (*q*).

(*h*) *Allport* v. *Nutt* (1845), 1 C. B. 974; *Gatty* v. *Field* (1846), 9 Q. B. 431; *Hardwick* v. *Lane*, [1904] 1 K. B. 204.

(*i*) In spite of the fact that the courts have adopted as a definition the description of a lottery given above, in which the wagering element is not mentioned, there is no reported case in which the element has been wholly absent. Indeed, the courts have gone out of their way to discover its presence, *e.g.*, *Willis* v. *Young and Stembridge*, [1907] 1 K. B. 448, where DARLING, J., expressed a doubt whether if the distribution had been wholly gratuitous the scheme under discussion would have been a wager; and compare the observations of Lord SELBORNE, L.C., that the statutes have reference to gambling transactions only (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685).

(*k*) *Willis* v. *Young and Stembridge*, *supra*.

(*l*) *Ibid.*

(*m*) *Ibid.*

(*n*) *Taylor* v. *Smetten* (1883), 11 Q. B. D. 207; and compare *Morris* v. *Blackman* (1864), 2 H. & C. 912. It is submitted that "full value" must be understood as meaning that nothing is added to the price of the article for the chance. But the chance, by offering an inducement to others to purchase, so increases the sale of the article that it becomes possible to provide the prizes out of the profits. It is only in this indirect way that the purchasers contribute to the prizes; but this contribution is sufficient to make the scheme a lottery (*Hunt* v. *Williams* (1888), 52 J. P. 821; *Hall* v. *McWilliam* (1901), 85 L. T. 239; and compare *Willis* v. *Young and Stembridge*, *supra*).

(*o*) *Taylor* v. *Smetten*, *supra*; *R.* v. *Harris* (1866), 10 Cox, C. C. 352.

(*p*) *Willis* v. *Young and Stembridge*, *supra*, *per* DARLING, J.

(*q*) *Caminada* v. *Hulton* (1891), 60 L. J. (M. C.) 116; *Hall* v. *Cox*, [1899] 1 Q. B. 198, C. A.; *Stoddart* v. *Sagar*, *Sagar* v. *Stoddart*, [1895] 2 Q. B. 474; compare, however, *Blyth* v. *Hulton & Co., Ltd.* (1908), 24 T. L. R. 719, C. A., a case in which a "last line" or "limerick" competition was held to be a lottery. It is suggested that in view of the finding that, upon its true construction, the contract provided that the editor should have "an arbitrary unfettered choice as to who should be declared the winner of the competition, and that the winner should be selected not according to merit, but according to fancy, or according to some temporary rule which the editor might choose to adopt," this case is not in conflict with the statement in the text. But the view taken by BUCKLEY, L.J., of

SECT. 1. Definition.

It seems that the substantial object of the whole scheme will be looked at in order to ascertain whether it is a lottery. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate the scheme (*r*). Sales by lottery are void (*s*), and also promises, either with or without consideration, conditioned upon the result of a lottery (*t*); but joint tenants, tenants in common, and part owners of real property can validly divide their property by lot, and obtain a good title to their shares by such division (*u*).

Art Unions.

606. Art Unions are also exempted, on certain conditions (*a*), from the operation of the Lottery Acts (*b*), and are made lawful associations, and the members of, and subscribers and contributors to them, and their agents, are exempted from penalties (*c*).

SECT. 2.—*Offences.*

Setting up, or selling chances in lotteries.

607. Lotteries are common nuisances (*d*), and persons setting them up are liable to be indicted at common law accordingly (*e*).

the duties of the editor, makes his decision difficult to reconcile with earlier decisions, particularly with *Hall* v. *Cox*, [1899] 1 Q. B. 198, C. A., which, however, was not cited. A similar conclusion was arrived at upon the facts in *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (1910), 26 T. L. R. 335, C. A. An instance where skill could have, but did not, contribute to the result occurred in Scotland. An automatic machine, having several compartments into which a coin could be projected by the operator by means of a spring, a prize being obtained by lodging the coin in certain of the compartments, where skill, if acquired by the operator, would have contributed to success, but where the circumstances were such that it was practically impossible to acquire it, was held to be a lottery (*Santongeli* v. *Neilson* (1900), 3 Fraser (Justiciary Cases), 10). Similar machines have, in England, been held to be unlawful games (*Fielding* v. *Turner*, [1903] 1 K. B. 867; *Thompson* v. *Mason* (1904), 90 L. T. 649). It therefore seems unnecessary to consider whether they are also lotteries.

(*r*) *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; and compare *O'Connor* v. *Bradshaw* (1850), 5 Exch. 882. In *Sykes* v. *Beadon* (1879), 11 Ch. D. 170, JESSEL, M.R., expressed the opinion that a scheme for investment, which included a division of profits by lot, contravened the Lottery Acts, as to which, see p. 301, *post*. The case, however, was not decided upon this point; and was overruled by *Smith* v. *Anderson* (1880), 15 Ch. D. 247, C. A., without mention being made of the question of lottery.

(*s*) Gaming Act, 1738 (12 Geo. 2, c. 28), s. 4. The subject-matter of the sale is also forfeitable (*ibid.*); the Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36, also imposes a penalty upon persons selling by lot. See also *Fisher* v. *Bridges* (1854), 3 E. & B. 642, Ex. Ch.

(*t*) Gaming Act, 1802 (42 Geo. 3, c. 119), s. 5.

(*u*) Gaming Act, 1738 (12 Geo. 2, c. 28), s. 11, excepts from the operation of the Act partitions by lot between "part-owners, joint tenants, and tenants in common" of "manors, honours, royalties, lands, tenements, advowsons, presentations, rents, services, and hereditaments."

(*a*) Art Unions Act, 1846 (9 & 10 Vict. c. 48), s. 1. The conditions of exemption are—that a royal charter of incorporation shall have been first obtained, or that the instrument of association and the rules and regulations of the association shall be approved by the Privy Council; also, that the charter or instrument of association be expressed to be revocable on the report of the Privy Council that the association has been perverted from its objects.

(*b*) As to these Acts, see p. 302, *post*.

(*c*) Art Unions Act, 1846 (9 & 10 Vict. c. 48), s. 1.

(*d*) Stat. (1698) 10 Will. 3, c. 23, s. 1; Gaming Act, 1802 (42 Geo. 3, c. 119), s. 1.

(*e*) *R.* v. *Crawshaw* (1860), Bell, C. C. 303.

SECT. 2. Offences.

Setting up or maintaining a lottery is also a statutory offence (*f*), and none the less so because set up under a grant from a foreign government (*g*). So also is selling by lot, or setting up or maintaining any place for the purpose (*h*). But the temporary use of a room, on one occasion only, for the purpose of drawing a lottery is not within the prohibition (*i*). The word "place" extends to any place in or outside an inclosed building, whether on land or water (*k*).

Making proposals or schemes for lotteries dependent upon the chances of a public lottery authorised by Act of Parliament is also an offence (*l*). Selling tickets, chances, or shares in any English or foreign lottery (*m*), or delivering them or causing them to be delivered (*n*), or procuring or delivering any tickets in any foreign or any pretended foreign lottery, or in any undertaking in the nature of a lottery, or in any duplicate or pretended duplicate of any foreign or pretended foreign lottery; or receiving money for such tickets or in consideration of any money to be repaid in case any ticket in any foreign or pretended foreign lottery, or part thereof, proves fortunate (*o*), are offences.

Persons who aid, abet, counsel, or procure the commission of an offence are themselves guilty of an offence (*p*).

(*f*) Stat. (1698) 10 Will. 3, c. 23, s. 2; penalty £500 and prosecution of offender as a common rogue (*ibid.*): Gaming Act, 1802 (42 Geo. 3, c. 119), s. 2; penalty £500, or offender punishable as a rogue (*ibid.*, ss. 2, 3).

(*g*) Lotteries Act, 1722 (9 Geo. 1, c. 19), s. 4; penalty £200 and imprisonment for one year (*ibid.*). The statute provides for an appeal. The lotteries which are forbidden are those set up in this country, so that a company incorporated in this country for the purpose of operating lotteries abroad commits no offence (*Macnee* v. *Persian Investment Corporation* (1890), 44 Ch. D. 306).

(*h*) Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36; Gaming Act, 1738 (12 Geo. 2, c. 28), s. 1 (which provide a right of appeal). The penalty under the former Act is £500, and also imprisonment for one year, and under the latter Act £200: Gaming Act, 1802 (42 Geo. 3, c. 119), s. 2; see note (*f*), *supra*. Proceedings must be taken within three months (Gaming Act, 1738 (12 Geo. 2, c. 28), s. 12).

(*i*) *Martin* v. *Benjamin*, [1907] 1 K. B. 64.

(*k*) Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 60.

(*l*) Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36; Gaming Act, 1738 (12 Geo. 2, c. 28), s. 1. For penalty and appeal, see note (*h*), *supra*.

(*m*) Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36; for penalty, see note (*h*), *supra*: Lotteries Act, 1722 (9 Geo. 1, c. 19), s. 4; for penalty, see note (*g*), *supra*: Lotteries Act, 1732 (6 Geo. 2, c. 35), s. 29; the penalty is £200 and imprisonment for one year, and a right of appeal is given (*ibid.*, s. 30): Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 41; the penalty is not exceeding £50, and offenders are to be deemed to be rogues and vagabonds, and may be imprisoned for from one to six months, and in case of a second offence may, in addition, be whipped. Under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4, a fine of £25 may be imposed in lieu of imprisonment. A limited company cannot be convicted of an offence under this section (*Hawke* v. *E. Hulton & Co., Ltd.*, [1909] 2 K. B. 93).

(*n*) Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36; for penalty, see note (*h*), *supra*: Lotteries Act, 1722 (9 Geo. 1, c. 19), s. 4; for penalty, see note (*g*), *supra*: Gaming Act, 1738 (12 Geo. 2, c. 28), s. 1; for penalty, see note (*h*), *supra*.

(*o*) Lotteries Act, 1732 (6 Geo. 2, c. 35), s. 29; for penalties, see note (*m*), *supra*. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 547.

(*p*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5. A wholesale dealer who pressed his goods upon a retailer, such goods containing, in some

Advertising lotteries.

608. Any person who prints or publishes or causes to be printed or published any advertisement or other notice of, or relating to, a drawing or intended drawing of any foreign lottery, or of any lottery or lotteries not authorised by Act of Parliament, or who prints or publishes or causes to be printed or published any advertisement or other notice of, or for sale of, any ticket or tickets, chance or chances, or any share or shares of any ticket or tickets, chance or chances, of or in any such lottery, or any advertisement or notice concerning or in any manner relating to any such lottery, or any ticket, chance, or share, tickets, chances, or shares, thereof or therein, is subjected to a penalty (*q*). It seems that the advertisements or notices contemplated are such as invite subscription to lotteries (*r*), and that persons who distribute such notices publish them (*s*).

Search warrants.

609. Magistrates have power, in certain cases, to authorise the search of any house, of which complaint of offences connected with lotteries having been committed has been made to them, and offenders and persons who are found there and who have knowingly aided or assisted, or have been concerned with any offender in carrying on any transactions respecting lotteries, and all persons, not discovered in the house, but employing others in any such transactions or in assisting such others, are liable to be dealt with as rogues and vagabonds. Persons forcibly obstructing the search are liable to fine, imprisonment, and public whipping at the discretion of the court (*t*).

cases, money prizes, with a view to resale to the public, was convicted under this section (*Barratt* v. *Burden* (1893), 63 L. J. (M. C.) 33).

(*q*) Lotteries Act, 1836 (6 & 7 Will. 4, c. 66); penalty £50. The offences covered by this Act are separately dealt with by several earlier Acts which remain in force. It is an offence by writing or printing to publish the setting up of a lottery with intent to have such lottery drawn (Lotteries Act, 1710 (9 Ann. c. 6), s. 57); penalty £100: to make, print, advertise or publish, or cause to be made, printed, advertised or published, proposals or schemes for lotteries dependent upon the chances of an authorised lottery (Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36; Gaming Act, 1738 (12 Geo. 2, c. 28), s. 1; for respective penalties, see note (*h*), p. 302, *ante*): to make, print or publish, or to cause to be made, printed or published, any proposal or scheme for any lottery set up by virtue of a grant of a foreign government, or any undertaking in the nature of a lottery (Lotteries Act, 1722 (9 Geo. 1, c. 19), s. 4; for penalties, see note (*g*), p. 302, *ante*): to publish proposals for sale of tickets in any lottery, foreign or otherwise (Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 41; see note (*m*), p. 302, *ante*). A limited company cannot be convicted under this section (*Hawke* v. *E. Hulton & Co., Ltd.*, [1909] 2 K. B. 93). The importation of notices or advertisements of lotteries, intended for distribution in this country, is prohibited by the Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 1 (2).

(*r*) *Macnee* v. *Persian Investment Corporation* (1890), 44 Ch. D. 306. A prospectus inviting subscriptions to a company formed for the purpose of carrying on foreign lotteries is not such a notice or advertisement (*ibid.*).

(*s*) Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 59; Gaming Act, 1802 (42 Geo. 3, c. 119), s. 4; *King* v. *Smith* (1791), 4 Term Rep. 414, *per* Lord KENYON, C.J., at p. 419. The Act under which the action was brought to recover penalties was stat. (1782) 22 Geo. 3, c. 47, s. 13 (now repealed), which forbade persons "to publish any proposal" for a lottery.

(*t*) Lotteries Act, 1823 (4 Geo. 4, c. 60), ss. 59, 61; Gaming Act, 1802 (42 Geo. 3, c. 119), s. 4.

SECT. 2. Offences.

Liability of adventurers.

610. Those who take part in lotteries, or sales by lotteries, as adventurers, players, or contributors, also commit an offence (*a*); and since lotteries are unlawful games (*b*), places where they are carried on would seem to be common gaming-houses (*c*), and persons frequenting such places liable accordingly (*d*). The pecuniary penalties provided for any offence concerning lotteries are recoverable only at the suit of the Attorney-General (*e*).

(*a*) Stat. (1698) 10 Will. 3, c. 23, ss. 2, 3; penalty £20: Lotteries Act, 1721 (8 Geo. 1, c. 2), s. 36; penalty, double their contribution: Gaming Act, 1738 (12 Geo. 2, c. 28), s. 3: penalty £50.
(*b*) See pp. 284, 285, *ante*.
(*c*) See p. 288, *ante*.
(*d*) See pp. 287, 291, *ante*.
(*e*) Lotteries Act, 1806 (46 Geo. 3, c. 148), s. 59; Lotteries Act, 1845 (8 & 9 Vict. c. 74), ss. 3, 4.

GANGMASTERS.

See AGRICULTURE.

GAOL AND GAOLER.

See PRISONS.

GAOL DELIVERY.

See COURTS; CRIMINAL LAW AND PROCEDURE.

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See AGRICULTURE; ALLOTMENTS; OPEN SPACES AND RECREATION GROUNDS.

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GAS.

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Part I.—Powers to Carry on a Gas Undertaking.

SECT. 1.—*Undertakings without Statutory Powers.*

SECT. 1. Undertaking without Statutory Powers.

611. Gas is supplied for general use in a number of places by persons or companies who have no special statutory authority and whose rights and liabilities are governed by the general law (*a*). They have no right to interfere with streets or highways for the purpose of laying their mains or pipes, and are liable to be indicted for a nuisance for such interference, even when it has been done with the consent of the road authority (*b*). They are also liable in damages in respect of any injuries thereby occasioned (*c*). The courts, however, will not restrain them by injunction from opening the streets to lay pipes, provided the annoyance to the public is temporary and not serious (*d*), though they are subject to the rights of the owners of the soil through which their pipes may be laid, and an injunction restraining the unauthorised laying of such pipes will be granted at the instance of an owner (*e*).

Liabilities under the general law.

SECT. 2.—*Powers under General Statutes.*

SUB-SECT. 1.—*Under Lighting and Watching Act.*

612. Certain local authorities have power under general statutes to light or cause their streets and roads to be lighted with gas, and for this purpose to erect lamp-posts and lay the necessary pipes. A general power of this kind was obtainable in any parish by the adoption of the Lighting and Watching Act, 1833 (*f*). The operation of the Act is now confined to rural districts, and to those only which have not obtained urban powers of lighting (*g*). It might,

Rural districts.

(*a*) Thus for the recovery of their charges they have no summary remedy and must sue in contract; they have nothing in the nature of a monopoly, and lack other privileges which are granted to statutory companies. At the same time they are free from many restrictions, and are under no obligation to supply gas to anyone (*Hoddesdon Gas and Coke Co.* v. *Haselwood* (1859), 6 C. B. (N. S.) 239). As to the compulsory purchase of non-statutory undertakings, see p. 321, *post*.

(*b*) *R.* v. *Sheffield Gas Consumers' Co.* (1853), 18 Jur. 146, n.; *R.* v *Longton Gas Co.* (1860), 2 E. & E. 651; and see *Preston Corporation* v. *Fullwood Local Board* (1885), 53 L. T. 718. They may also be liable to a penalty under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72, for damaging the highway (*Hawkins* v. *Robinson* (1872), 37 J. P. 662). As to damages to highways generally, see title HIGHWAYS, STREETS, AND BRIDGES.

(*c*) *Ellis* v. *Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767.

(*d*) *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304; *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; and see *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349, *per* TURNER, L.J., at pp. 354, 355; *Edgeware Highway Board* v. *Harrow Gas Co.* (1874), L. R. 10 Q. B. 92.

(*e*) *A.-G.* v. *Cambridge Consumers Gas Co.*, *supra*, at pp. 86, 87; *Goodson* v. *Richardson* (1874), 9 Ch. App. 221; and see *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70. As to support to these pipes, see *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1883), 52 L. J. (Q. B.) 629, C. A.

(*f*) 3 & 4 Will. 4, c. 90. As to adoption, see *ibid.*, s. 4.

(*g*) It is superseded in urban districts and in rural districts with urban lighting powers by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163. In London

SECT. 2. Powers under General Statutes.

and still may, be adopted for the whole or part of a parish (*h*). Before the 5th March, 1894 (*i*), it was administered by inspectors appointed by the ratepayers; but as from that date, in cases where it had been adopted for the whole parish, the powers were transferred to the parish council (*k*). If it had been adopted for part only, the parish meeting or the inspectors were authorised to transfer the powers, duties, and liabilities to the parish council subject to any conditions with respect to the execution thereof by means of a committee (*l*). The Act may now be adopted for a whole parish by the parish meeting (*m*), or for part of a parish by a parish meeting held for that part (*n*), and in either case the parish council, if the parish has one, is to be the authority for the execution of the Act (*o*). If the parish has not a council, the executive authority will be appointed by the parish meeting (*p*).

Powers of lighting roads.

613. The authorities for the execution of the Act are empowered from time to time to cause such lamp-irons or lamp-posts or other posts to be put up or fixed upon or against the walls or palisades of any houses, tenements, buildings, or inclosures (doing as little damage as may be practicable thereto), or to be put up and erected in such other manner, within all or any of the roads, streets, and places within the area for which the Act has been adopted, as they shall think proper; and also to cause such number of lamps of such sizes and sorts to be provided and affixed as they shall think necessary for lighting all or any of such roads, streets, and places, and to cause the same to be lighted with gas, oil, or otherwise, for such number of hours in every twenty-four as they shall think necessary (*q*). Gas mains or pipes may not be laid in private land nor against or into private houses, manufactories, or public buildings without the consent of the owner (*r*), and there are provisions directed against nuisances arising from the escape of gas and against the contamination of water by gas (*s*). Land may be purchased or hired by agreement for the purposes of the Act (*t*), and the authorities may contract with persons and companies for the

it was impliedly superseded by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 90, 92, 130, 165.

(*h*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 4, 73, 77 Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (1).

(*i*) The date of the coming into operation of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*k*) *Ibid.*, s. 7 (5).

(*l*) *Ibid.*, s. 53 (1).

(*m*) *Ibid.*, s. 7 (1).

(*n*) *Ibid.*, s. 7 (4).

(*o*) *Ibid.*, s. 7 (7).

(*p*) *Ibid.*, s. 19 (4). As to parish meetings and parish councils, see title LOCAL GOVERNMENT.

(*q*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 45. The power to light roads includes main roads (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (11)).

(*r*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 46. Lamps may not be fixed against private houses without permission (*Meek* v. *Langdon* (1862), 37 L. T. Jo. 181).

(*s*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 48—54; see pp. 362 *et seq.*, *post*.

(*t*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 59.

lighting, and for furnishing the lamp-posts and other things necessary (*a*).

SUB-SECT. 2.—*Under Public Health Act.*

Urban lighting powers.

614. In urban districts, the borough or district council may contract with any person for the supply of gas or other means of lighting the streets, markets, and public buildings in their district, and may provide such lamps, lamp-posts, and other materials and apparatus as they may think necessary for lighting the same (*b*). They may themselves undertake to supply gas for public and private purposes, provided there is not any company or person (other than themselves) authorised by or in pursuance of any Act of Parliament, or any order confirmed by Parliament, to supply gas for public and private purposes. If there is any such company or person so supplying gas, but the limits of supply of such company or person include part only of the district, the council may themselves undertake to supply gas throughout any part of the district not included within such limits of supply (*b*). In the above-mentioned cases the council may obtain a provisional order authorising a gas undertaking under and subject to the provisions of the Gas and Water Works Facilities Act, 1870 (*c*), and any Act amending the same (*b*). Urban authorities may also acquire the powers of gas companies by purchase of the whole undertaking (*d*). Rural district councils may be invested by the Local Government Board with the same powers as regards lighting and gas supply as urban authorities, either in respect of the whole of their district or of any contributory place therein (*e*).

SUB-SECT. 3.—*In the Metropolis.*

Metropolis Management Act.

615. In London the city and borough councils are required to cause the several streets within their districts to be well and sufficiently lighted, and for that purpose they are required to maintain or set up and maintain a sufficient number of lamps in every such street and to cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as the council may think necessary and proper (*f*).

(*a*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 57.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161. As to supplying outside areas, see *Pudsey Coal Gas Co.* v. *Bradford Corporation* (1873), L. R. 15 Eq. 167. The limitation does not prevent the local authority supplying electricity (*Fareham Local Board and Fareham Electric Light Co.* v. *Smith* (1891), 7 T. L. R. 443). As to lighting of streets generally, see titles HIGHWAYS, STREETS AND BRIDGES; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) 33 & 34 Vict. c. 70; and see p. 312, *post.*

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 162. It has not yet been decided whether they can exercise these powers after purchase, or whether a further Act or provisional order is necessary. As to such purchase, see p. 320, *post.*

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276. The effect of such investment is to supersede the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90); see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163. Such investment may be confined to public lighting only (*Lancashire and Yorkshire Rail. Co.* v. *Bolton Union Assessment Committee and Great Lever (Township) Overseers* (1890), 15 App. Cas. 323).

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 130. As to enforcing this duty, see *R.* v. *St. Mary, Islington, Vestry* (1858), E. B. & E. 743;

SECT. 3. Grant of Special Statutory Powers.

SECT. 3.—*Grant of Special Statutory Powers.*

SUB-SECT. 1.—*In General.*

Private Act or provisional order.

616. Parliamentary authority to carry on a gas undertaking, and for that purpose to break open the public streets, may be obtained in many cases by means of a provisional order subsequently confirmed by Parliament (*g*), but when that procedure is not suitable the necessary authority may be obtained by procuring the passing of a local and personal Act (*h*). This latter procedure will, in general, be necessary when the undertakers require to purchase land compulsorily (*i*).

Nature of powers granted.

617. Gas undertakers are commonly authorised to manufacture and supply gas for lighting, heating, motive, and other purposes within certain limits, and also to provide, produce, sell, dispose of and deal in gas, coke, tar, and all other residual products resulting from the manufacture of gas, and generally to carry on the business usually carried on by a gas company (*j*). They have also been authorised to sell, let for hire, fix, repair, and remove, and in some cases to manufacture, engines, stoves, ranges, pipes, and other fittings for lighting, for motive power, for the warming and ventilating of houses and buildings, for the cooking of food, and for all other purposes for which gas can or may be used, and to provide all materials and work necessary and proper in that behalf, and with respect thereto to demand and take such remuneration or rents and charges, and make such terms and conditions, as may be agreed upon (*k*). Some corporations have been authorised to supply

R. v. *Lambeth Vestry* (1861), 25 J. P. 374. As to obtaining a supply from the gas companies, and generally as to the gas supply of the metropolis, see p. 375, *post*.

(*g*) Under the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), as amended by the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89); see p. 312, *post*.

(*h*) For the procedure for obtaining the passing of a local and personal Act and private Bill procedure, see title PARLIAMENT. Local authorities may also in some instances obtain special statutory powers by the purchase of the rights and privileges of gas undertakers; see p. 320, *post*.

(*i*) The power to take land compulsorily cannot be obtained under the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70); see *ibid.*, ss. 7, 10. In the case of local authorities the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176, may be available where the land is required for one of the purposes of that Act.

(*j*) See Model Gas Bill, 1910, clause 5. Undertakers have also been expressly authorised, for the purpose of the undertaking, to acquire licences or authority to work inventions under letters patent granted in respect of gas manufacture or supply or utilisation of patents.

(*k*) *Ibid.*, clause 30 (1). In the case of local authorities Parliament has, in granting this power, inserted a proviso to the effect that such authority may not expend money (except through a contractor) upon the provision of such fittings, or of labour and materials required for the fixing, repairing, or removal thereof upon or from the premises of their consumers or prospective consumers. They must also adjust the charges to be made for any such fittings, or for the fixing, repairing, or removal thereof, so as to meet any expenditure by them under these powers in connection therewith, including interest upon moneys borrowed for those purposes, and all sums applied to sinking funds for repayment of moneys so borrowed. Every sum charged by the local authority in respect of the provision of such fittings, or the fixing, repairing, or removal thereof, shall be separately stated on every demand note delivered by the local authority to the consumer. The total sums expended and received by the local authority in connection with these purposes in each year, including

non-illuminating gas at a cheaper rate than the illuminating gas supplied to ordinary consumers (*l*). Gas companies have at times been authorised to apply for provisional orders to obtain electric lighting powers (*m*).

SUB-SECT. 2.—*By Local and Personal Act.*

Persons who may petition.

618. Any person may petition Parliament for an Act to authorise a gas undertaking, but local authorities who desire to acquire the necessary powers at the expense of the local funds or rates under the Borough Funds Acts, 1872—1903 (*n*), must proceed by provisional order, if their object can, for the time being, be so attained (*o*).

Standing orders applicable to gas undertakings.

619. Private or local Bills which seek powers with reference to gasworks belong to the first of the two classes into which Bills are divided in both Houses of Parliament for the purposes of the standing orders (*p*). In addition to the orders generally applicable to that class, it is required, in the case of Bills for constructing gasworks or works for the manufacture or conversion of the residual products of gas, that the notices shall set forth and specify the lands in and upon which such works are intended to be constructed (*q*). It is required also that on or before the 15th December immediately preceding the application for a Bill for constructing either of such works, notice shall be served upon the owner, lessee, and occupier of every dwelling-house situated within 300 yards of the lands in or upon which those works may be constructed (*r*).

In every Bill for constructing such works there must also be inserted a clause defining the lands in or upon which the works may be constructed (*s*). A printed copy of every Bill relating to gas must be deposited at the office of the Board of Trade on or before the 18th December, in the case of Bills before the House of Commons, and the 21st December in the case of those before the House of Lords (*t*).

interest and sinking fund, must be shown separately in the published accounts of the gas undertaking of the local authority for that year (Model Gas Bill, 1910, clause 30 (3)).

(*l*) See Glasgow Corporation Gas Act, 1882 (45 & 46 Vict. c. cxc.), s. 5, repealed by Glasgow Gas Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxxi.). The corporation of Glasgow is also by the later Act allowed to charge lower prices to large consumers of gas than to small consumers, thus repealing s. 10 of the Act of 1882 (see Glasgow Gas Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxxi.), ss. 25, 27).

(*m*) A clause for this purpose appeared at one time in the Model Gas Bill (see that for 1900), but is now omitted. For electric lighting companies, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 541 *et seq.*; and for a form of Bill to extend the powers of a gas company to include electric lighting, see Encyclopædia of Forms and Precedents, Vol. IX., p. 264.

(*n*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), and Borough Funds Act, 1903 (3 Edw. 7, c. 14). The application of the Act of 1872 was extended to county councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 15, and to the metropolitan borough councils by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (6).

(*o*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 10.

(*p*) Standing Order 1 of each House. As to procedure generally, see title PARLIAMENT.

(*q*) Standing Order 5 of each House.

(*r*) Standing Order 15 of each House.

(*s*) Standing Order 139 of the House of Lords and 187 of the House of Commons.

(*t*) Standing Order 33 of each House.

SECT. 3. Grant of Special Statutory Powers.

Orders as to additional capital.

620. It is also provided by the standing orders of the House of Commons that, in every Bill by which an existing gas company is authorised to raise additional capital, provision shall be made for the offer of such capital by public auction or tender at the best price which can be obtained, unless the committee on the Bill shall report that such provision ought not to be required, with the reasons on which their opinion is founded (*a*). It is further provided that in the case of every such gas Bill it shall be competent to the committee so to regulate the price of gas to be charged to consumers that any reduction of an authorised standard price shall entitle the company to make a proportionate increase of the authorised dividend, and that any increase above the standard price shall involve a proportionate decrease of dividend (*b*). The standing orders of the House of Commons also provide that the municipal or other local authority of any town or district alleging in their petition that such town or district may be injuriously affected by the provisions of any Bill relating to the lighting thereof, or the raising of capital for such purpose, shall be entitled to be heard against such Bill (*c*).

SUB-SECT. 3.—*By Provisional Order.*

Persons who may obtain orders.

621. Provisional orders authorising certain gas undertakings may be obtained in any district other than districts within the metropolis by any company, companies, or persons, under the authority of the Gas and Water Works Facilities Act, 1870 (*d*), as amended by the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (*e*). Urban authorities who may under the Public Health Act, 1875 (*f*), themselves undertake to supply gas for the whole or any part of their district, and rural authorities upon whom these urban powers are conferred, may also obtain a provisional order under these Acts in respect of such district or part thereof (*g*). The term "undertakers" used in the two first-mentioned Acts is deemed to include such company, companies, or person and such authorities (*h*).

Undertakings to which applicable.

622. The gas undertakings in respect of which provisional orders may be obtained are those for which powers are required for all or any of the following purposes—(1) to construct or to maintain and continue gasworks and works connected therewith or to manufacture and supply gas in any district within which there is not

(*a*) Standing Order 188 of the House of Commons. There is a very similar provision in Standing Order 140A of the House of Lords; for the form of these provisions, see pp. 370 *et seq.*, *post*.

(*b*) Standing Order 188 of the House of Commons. As to the form of such clause, see p. 369, *post*.

(*c*) Standing Order 134A.

(*d*) 33 & 34 Vict. c. 70. S. 15 (*ibid.*) provides that the Act shall not apply to any place within the metropolis as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120).

(*e*) 36 & 37 Vict. c. 89; see also s. 15 (*ibid.*) as to the exclusion of the metropolis. See, further, as to provisional orders, title PARLIAMENT.

(*f*) 38 & 39 Vict. c. 55.

(*g*) *Ibid.*, s. 161; and see p. 309, *ante*.

(*h*) *Ibid.*, s. 161; and Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 4.

SECT. 3. Grant of Special Statutory Powers.

an existing company, corporation, body of commissioners, or person empowered by Act of Parliament to construct such works or to manufacture and supply gas; (2) to raise additional capital necessary for any of the purposes aforesaid; (3) to enable two or more companies or persons, duly authorised to supply gas in any district or in adjoining districts, to enter into agreements jointly to furnish such supply or to amalgamate their undertakings; (4) to authorise two or more companies or persons supplying gas in any district or in adjoining districts to manufacture and supply gas and to enter into agreements jointly to furnish such supply and to amalgamate their undertakings (*i*). Any gas companies empowered as aforesaid may apply for and avail themselves of the facilities of this Act within their own districts respectively (*i*).

Consent necessary before order obtained.

623. Where the undertakers require powers for the purpose of constructing gasworks or works connected therewith, within any district, the consent of the local authority of such district is necessary before any provisional order can be obtained; and where in such district there is a road authority distinct from the local authority, the consent of such road authority is also necessary in any case where power is sought to break up any road of such road authority, unless the Board of Trade or, in the case of applications by urban authorities, the Local Government Board, in any case in which the consent of the local authority or road authority is refused, are of opinion, after inquiry, that, having regard to all the circumstances of the case, such consent ought to be dispensed with. When the Board dispense with such consent they are required to make a special report stating the grounds on which they have dispensed with the same (*k*). The local authority, the consent of which is required, is in boroughs the town council, in urban districts the district council, and in rural parishes the parish council, or, where there is no parish council, the parish meeting (*l*).

Procedure to obtain order.

624. The undertakers who intend to make an application for a provisional order must on or before the 1st November next before their application give notice in writing of their intention to make the same to every company, corporation, or person (if any) supplying gas within the district to which the proposed application refers (*m*). In the months of October and November next before their application, or in one of these months, they must publish notice of their intention to make such application by advertisement according to certain rules and regulations (*n*). On or before the

(*i*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 3.

(*k*) *Ibid.*, s. 4; and Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161, in the case of applications by urban authorities.

(*l*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 2, and Sched. A, as varied by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 5; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 6, 19, 21. The road authority in most cases is the town council in boroughs, and the district council in urban and rural districts. As regards many main roads, the road authority is the county council; see title HIGHWAYS, STREETS, AND BRIDGES. As to local authorities in general, see title LOCAL GOVERNMENT.

(*m*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 5 (1).

(*n*) *Ibid.*, s. 5 (2). The whole notice must be included in one advertisement, which is to be headed with a short title, descriptive of the undertaking. Each advertisement is to contain the following particulars:—(1) The objects of the

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30th of the same month of November certain documents (*o*) must be deposited at the office of the Board of Trade in the case of applications by companies or persons (*p*), and at the office of the Local Government Board in the case of applications by local authorities, made pursuant to the Public Health Act, 1875 (*q*). These documents must also be deposited for public inspection in the office of the clerk of the county council or of the peace for every county, riding, or division which will be affected by the proposed undertaking or in which any new work will be made (*r*). On or before the 23rd December in the same year there must be

intended application; (2) a general description of the nature of the proposed new works (if any); (3) the names of the town-lands, parishes, townships, and extra-parochial places, in which the proposed new works (if any) will be made; (4) the time and places at which the deposit, which has to be made before the 30th November, will be made; (5) an office, either in London or at the place to which the intended application relates, at which printed copies of the draft provisional order when deposited, and of the provisional order when made, will be obtainable. The advertisement is also, in every case, to be inserted once at least in the *London Gazette*, and once at least in each of two successive weeks in some one and the same newspaper published in the district affected by the proposed undertaking, where the proposed works (if any) will be made; or if there be no such newspaper, then in some one and the same newspaper published in the county in which every such district, or some part thereof, is situated; or if there be none, then in some one and the same newspaper published in some adjoining or neighbouring county (see Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), Sched. B, Part I.). Other notices, and further particulars as to the notice to be given by advertisements—for example, as to the manner in which objections to the order may be sent in—are required by the rules made by the Board of Trade and Local Government Board respectively, under powers conferred on them by the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 14. For a form of application for a provisional order, see Encyclopædia of Forms and Precedents, Vol. IX., p. 345.

(*o*) These documents include (1) a copy of the advertisement published by them; (2) a map showing the land proposed to be used for the manufacture of gas, or of residual products arising in the manufacture of gas; (3) a proper plan and section of the proposed new works (if any), such plan and section to be prepared according to such regulations as may from time to time be made by the Board of Trade in that behalf, in the case of companies, and by the Local Government Board in the case of urban authorities, and rural authorities having urban powers (see Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), Sched. B, Part II. (1)), and the rules made pursuant to the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 14; and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161. These rules and regulations have been made and published by the Board of Trade and the Local Government Board respectively, and may be rescinded and added to at any time. They require, *inter alia*, compliance with the standing orders of Parliament; see pp. 311, 312, *ante*. For forms of parliamentary documents, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 138 *et seq.*

(*p*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 5 (1), and Sched. B, Part II.

(*q*) 38 & 39 Vict. c. 55, s. 161.

(*r*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), Sched. B, Part II. (2). The clerk of the peace acts as clerk to the county council in regard to the deposit of plans and documents (see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (6)). All maps, plans, and documents required by the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), as amended, to be deposited for the purposes of any provisional order, may be deposited with the persons and in the manner directed by the Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83), and all the provisions of that Act apply accordingly (Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 5).

deposited, according to certain regulations, certain other documents at the office of the Board of Trade or of the Local Government Board, as the case may be (*s*), and also a sufficient number of printed copies of the provisional order as proposed by the undertakers, with any schedule referred to therein, at the office named in that behalf in the advertisement, and such copies are to be there furnished to all persons applying for them at the price of not more than 1*s*. each (*t*).

Board to consider application and may hold inquiry.

625. The Board of Trade or the Local Government Board, as the case may be, must consider the application and also any objection that may be lodged with them on or before such day as they from time to time appoint (*a*), and must determine whether or not the undertakers may proceed with the application (*b*). When such Board are of opinion that it is expedient that an inquiry be held in relation to any application for a provisional order, they may order and direct such inquiry to be held at such time and place as they think proper, subject to certain provisions as to the holding thereof (*c*). When such Board consider it expedient and proper

(*s*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), Sched. B, Part III. The undertakers are, *inter alia*, required to deposit—(1) a memorial signed by the undertakers, headed with a short title descriptive of the undertaking (corresponding with that at the head of the advertisement), addressed to the Board of Trade or the Local Government Board, as the case may be, and praying for a provisional order; (2) a printed draft of the provisional order as proposed by the undertakers, with any schedule referred to therein; (3) an estimate of the expense of the proposed new works (if any), signed by the persons making them (Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), Sched. B, Part III.). Rules made respectively by the Board of Trade and the Local Government Board also require the deposit of additional documents and contain further regulations. Proof of compliance with provisions of the Act and of these rules is required. The memorial of the undertakers is to be written on foolscap paper bookwise, with quarter margin, and is to be in the following form, with such variations as circumstances require:—

[*Short Title of Undertaking.*]

To the Board of Trade (*or* Local Government Board, *as the case may be*).

The memorial of the undertakers of (*short title of undertaking*) showeth as follows:—

1. Your memorialists have published in accordance with the requirements of the Gas and Water Works Facilities Act, 1870, the following advertisement:—

[*Here Advertisement to be set out verbatim.*]

2. Your memorialists have also deposited, in accordance with the requirements of the said Act, copies of the said advertisement and (*here state deposit of several matters required*).

Your memorialists, therefore, pray that a provisional order may be made in the terms of the draft proposed by your memorialists or in such other terms as may seem meet.

A. B. }
C. D. } Undertakers.

(*t*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), Sched. B, Part III. (2).

(*a*) The day before which objections must be sent in and the method of sending them are contained in the rules referred to in note (*s*), *supra*.

(*b*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 6.

(*c*) Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 13. The provisions to which the inquiry is subject are contained in the same section, and are—(1) the inquiry is to be held in public before an officer or officers to be appointed in that behalf by the Board, and hereinafter called the commissioner or commissioners; (2) ten days' notice at

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that the application should be granted with or without addition or modification, or subject or not to any restriction or condition, and it has been proved to their satisfaction that all the requisitions as to notices and deposit of documents and like matters have been in all respects complied with, the Board may settle and make a provisional order accordingly (*d*).

Costs.

626. The costs of and connected with the preparation and making of each provisional order must be paid by the undertakers, and the Board may require the undertakers to give security for such costs before they proceed with the provisional order (*e*).

Publication of order when made.

Confirmation of order.

627. When the provisional order has been so made and delivered to the undertakers, they are required forthwith to deposit and publish the same by advertisement according to certain regulations (*f*). When it is proved to the satisfaction of the Board of Trade or the Local Government Board, as the case may be, that such publication has been completed (*g*), such Board must, as soon as they conveniently can after the expiration of seven days from the completion of such publication in relation to any

the least must be given by the commissioner or commissioners of the time and place at which the inquiry is to be commenced; (3) the inquiry must be commenced at the time and place so appointed, and the commissioner or commissioners may adjourn the inquiry from time to time as may be necessary to such time and place as he or they may think fit; (4) the commissioner or commissioners must, on the application of any party interested in the inquiry, by summons require the attendance before him or them, at a place or time to be mentioned in the summons, of any person to be examined as a witness before him or them, and every person summoned must attend and answer all questions touching the matter to be inquired into, and any person who wilfully disobeys any such summons or refuses to answer any question put to him by the commissioner or commissioners for the purposes of the inquiry becomes liable on summary conviction before two justices to a penalty not exceeding £5, but no person shall be required to attend in obedience to any such summons unless the reasonable charges of his attendance shall have been paid or tendered to him, and no person shall be required in any case in obedience to any such summons to travel more than ten miles from his place of abode; (5) the commissioner or commissioners are required to make a report to the Board in writing, and to deliver copies of the report upon request to all or any of the parties to the inquiry.

(*d*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 7. As to the contents of the order, see pp. 317, 322, 323, *post*.

(*e*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 7. Provision as to security for costs is contained in the rules issued by the Board of Trade. As the confirmation of the order is by public Act, the provisions of the Borough Funds Act, 1872 (35 & 36 Vict. c. 91), do not apply to costs of orders obtained by local authorities.

(*f*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 8. The regulations are contained in Part IV. of Sched. B to that Act, and by them it is required that the undertakers shall deposit printed copies of the provisional order when settled and made, for public inspection in the offices of the clerks of the peace or county council where the documents required to be deposited by them on or before the 30th November, were deposited (see note (*r*), p. 314, *ante*). They must also deposit a sufficient number of such printed copies at the office named in that behalf in the advertisement, such copies to be then furnished to all persons applying for them at a price which the Board of Trade have suggested should not be more than 1*s.* each. They are also to publish the provisional order as an advertisement once in the local newspaper in which the original advertisement of the intended application was published.

(*g*) The rules issued by the Board of Trade and the Local Government Board prescribe the form of proof of compliance with the above regulations.

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provisional order which shall have been published as aforesaid, not later than the 25th April in any year, procure a Bill to be introduced into either House of Parliament for an Act to confirm the provisional order, which must be set out at length in the schedule to the Bill. Until such confirmation by Act of Parliament the provisional order has no operation (*h*). If while any such Bill is pending in either House of Parliament a petition is presented against any such provisional order comprised therein, the Bill, so far as it relates to the order petitioned against, may be referred to a select committee, and the petitioner is allowed to appear and oppose as in the case of a Bill for a special Act (*h*). The Act confirming the provisional order is deemed a public general Act (*i*).

Power to make amending order.

628. When the Board of Trade or the Local Government Board, as the case may be, have made any such provisional order, they may from time to time revoke, amend, extend, or vary such order by a further provisional order. Every application for such further provisional order must be made in like manner and subject to the like conditions as the application for the former order, and the further order must be made and confirmed in like manner in every respect as the former order (*k*).

SECT. 4.—*Terms upon which Powers are Granted.*

Incorporation of Gasworks Clauses Acts.

629. Parliament in granting statutory powers to promoters of gas undertakings at the same time imposes duties and restrictions upon them for the benefit of the public. Provisions usually contained in Acts authorising gas undertakings are those of the Gasworks Clauses Act, 1847 (*l*), as amended and extended by the Gasworks Clauses Act, 1871 (*m*). The former Act was passed in order to consolidate such provisions (*n*). Since these Acts were passed it has become the practice of Parliament to insert in gas Acts further, and in some cases different, provisions, and those commonly inserted are to be found in the model Bills and clauses which are published under the authority of the Chairman of Committees of the House of Lords and are varied from year to year.

In provisional orders.

630. The Gasworks Clauses Act, 1847 (*l*), must be incorporated in every provisional order authorising a gas undertaking made under the Gas and Water Works Facilities Act, 1870 (*o*); and the Gasworks Clauses Act, 1871 (*m*), applies to every such order, save

(*h*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 9.

(*i*) *Ibid.* They are printed and published among the local and personal Acts.

(*k*) Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 12. There is also a power conferred on the Local Government Board by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303, to alter or amend local Acts by means of provisional order, and such power has been used to vary and amend special Acts relating to gas.

(*l*) 10 & 11 Vict. c. 15.

(*m*) 34 & 35 Vict. c. 41.

(*n*) See title to that Act and preamble.

(*o*) 33 & 34 Vict. c. 70, s. 10; Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 3; and see p. 312, *ante*.

SECT. 4. Terms upon which Powers are Granted.

where the provisions of either Act are thereby expressly varied or excepted (*p*), and the expression "the special Act" used in the Gasworks Clauses Acts includes a provisional order (*q*).

In local Acts.

As regards local Acts, the provisions of the Gasworks Clauses Act, 1847 (*r*), extend only to such gasworks as are authorised by an Act passed after the 23rd April, 1847, and which declares that the same are incorporated therewith (*s*). When incorporated, all the clauses of the Act, save so far as they are expressly varied or excepted by the local Act, apply to the undertaking authorised thereby so far as the same are applicable thereto, and with other incorporated clauses form part of such Act, and are construed therewith as forming one Act (*t*). The term "the special Act" is used to describe the incorporating Act (*u*).

The Gasworks Clauses Act, 1871 (*w*), must be construed together with the Gasworks Clauses Act, 1847 (*x*), as one Act, and the provisions of the later Act repeal and supersede those of the earlier Act inconsistent therewith (*y*). It follows, therefore, that the provisions of the later Act apply to undertakings authorised by local Acts passed previously to it and which incorporated the earlier Act, except in so far as these local Acts contain express variations and exceptions (*z*). The provisions of the Gasworks Clauses Act, 1871 (*a*), also apply to every gas undertaking authorised by any special Act passed after the 13th July, 1871, save where the provisions are expressly varied or excepted by such special Act (*b*).

Incorporation of parts of Gasworks Clauses Act.

631. The Gasworks Clauses Act, 1847 (*c*), is divided into groups of clauses relating to particular matters in order to facilitate the incorporation of parts thereof. The groups are preceded by

(*p*) In orders authorising urban authorities to carry on gas undertakings it is usual to except various clauses which are not applicable to these authorities, such as those dealing with profits, reserve fund, annual accounts, and supply to public lamps, other clauses being inserted.

(*q*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 2; Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 3; Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 10.

(*r*) 10 & 11 Vict. c. 15.

(*s*) *Ibid.*, s. 1. In practice they were invariably incorporated.

(*t*) *Ibid.* The clauses of other Acts usually incorporated are those contained in the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

(*u*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 2.

(*w*) 34 & 35 Vict. c. 41.

(*x*) 10 11 Vict. c. 15.

(*y*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 1; and see also Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 49.

(*z*) *Commercial Gas Co.* v. *Scott* (1875), L. R. 10 Q. B. 400; *South Metropolitan Gas Light and Coke Co.* v. *Noakes* (1889), 61 L. T. 556; *Dudley Gas Co.* v. *Warmington* (1881), 50 L. J. (M. C.) 69; compare *Gaslight and Coke Co.* v. *Hardy* (1886), 17 Q. B. D. 619, C. A.; *Leamington Priors Gas Co.* v. *Davis* (1886), 18 Q. B. D. 107. The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2, provided that the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), should be applicable to the various gas companies mentioned in that Act.

(*a*) 34 & 35 Vict. c. 41.

(*b*) *Ibid.*, s. 3. *E.g.*, in the Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 3, it is expressly provided that the Gasworks Clauses Act, 1871, shall not apply.

(*c*) 10 & 11 Vict. c. 15.

headings or words introductory to the enactment with respect to each matter (*d*). For the purpose of incorporating parts only of the Act with any other Act, it is enough to describe the clauses of the Gasworks Clauses Act, 1847 (*e*), respecting any matter, in the words introductory to the enactment respecting such matter, and to enact that the clauses so described, or that the Act with the exception of the clauses so described, shall be incorporated with such other Act, and thereupon all the clauses so incorporated form part thereof, save so far as they are expressly varied or excepted thereby, and it is to be construed as if such clauses were set forth therein with reference to the matter to which such Act relates (*e*).

Interpretation of terms.

632. In construing the Gasworks Clauses Acts the expression "the undertaking" means the gasworks and the works connected therewith by the special Act authorised to be constructed, and the expression "the undertakers" means the persons by the special Act authorised to construct the gasworks (*f*), and unless there be something in the subject or context repugnant to such construction, the expression "the gasworks" in the Gasworks Clauses Acts and in the special Act also means the gasworks and the works connected therewith by the special Act authorised to be constructed (*g*).

SECT. 5.—*Access to Special Act.*

Deposit of copies.

633. Parliament commonly requires the insertion in the special Act of provisions to enable persons interested and other members of the public to have access to the special Act. For this purpose the undertakers are commonly required (*h*), at all times after the expiration of six months of the passing of the special Act, to keep in their principal office of business a copy of the special Act printed by His Majesty's printers or some of them, and also within the space of such six months to deposit in the office of the clerk of the peace or county council of the county in which the undertaking is situated a copy of the special Act printed as aforesaid, and the said clerk must receive, and he and the undertakers must respectively keep, the said copies of the special Act, and permit all persons interested to inspect the same and make extracts and copies therefrom in the like manner and upon the like terms, and under the

(*d*) These groups, with the introductory headings with respect to each matter, are as follows:—Ss. 2, 3, the construction of the Act and any Act incorporated therewith; ss. 4, 5, citing the Act or any part thereof; ss. 6—12, the breaking up of streets for the purpose of laying pipes; ss. 13—17, the supply of gas, and the recovery of the rent to be paid for the same; ss. 18—20, waste or misuse of the gas, or injury to the pipes and other works; ss. 21—29, the provision for guarding against fouling water and other nuisance from the gas; ss. 30—38, the amount of profit to be received by the undertakers when the gasworks are carried on for their benefit; ss. 40, 42—44, the recovery of damages not specially provided for, and of penalties, and the determination of any other matter referred to justices or to the sheriff; ss. 45, 46, access to the special Act; ss. 47, 49 provide that the undertakers are not to be exempted from the provisions of certain Acts; and s. 48 saves the rights of the Crown; ss. 39, 41, and 50 have been repealed.

(*e*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 5.

(*f*) *Ibid.*, s. 2.

(*g*) *Ibid.*, s. 3. As to the term "the special Act," see p. 318, *ante*.

(*h*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 45.

SECT. 5. Access to Special Act.

like penalty for default, as is provided in the case of certain plans and sections by the Parliamentary Documents Deposit Act, 1837 (*i*). If the undertakers fail to keep or deposit any of the said copies of the special Act as above mentioned, they are liable to a penalty of £20 for every such offence, and also £5 for every day afterwards during which such copy shall not be so kept and deposited (*k*).

SECT. 6.—*Cesser of Powers to Construct Works.*

Limit of time for works.

634. Special Acts may contain a provision limiting the time within which the statutory powers for the construction of the works may be exercised. In the case of provisional orders, if the undertakers empowered by any order to make works do not, within three years from the date of such order, or within such shorter period as is prescribed therein, complete the works; or if within one year from the date of the order, or within such shorter period as is therein prescribed, the works are not substantially commenced; or if the works are commenced, but, whilst the powers to carry them on exist, are suspended without a reason sufficient, in the opinion of the Board of Trade or Local Government Board, as the case may be, to warrant such suspension, the powers given by the provisional order to the undertakers for executing such works or otherwise in relation thereto cease to be exercised, except as to so much of the same as is then completed, unless the time be prolonged by the special direction of the Board of Trade or Local Government Board, as the case may be (*l*). A statement in writing by such respective Board to the effect that such works have not been completed, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason, is conclusive evidence for the purposes of this provision of such non-completion, non-commencement, or suspension (*l*).

SECT. 7.—*Sale of Undertaking to Local Authority.*

Powers of sale and purchase by agreement.

635. Any urban authority (*m*) may (with the sanction of the Local Government Board), for the purpose of supplying gas within their district or any part thereof, either for public or private purposes, buy, upon such terms as may be agreed on between such authority and the company, all the rights, powers, and privileges, and all or any of the lands, premises, works, and other property of any gas company, but subject to all liabilities attached to the same at the time of such purchase. The directors of any such company may likewise sell and transfer the same to such authority in pursuance, in the case of a company registered under the provisions of the Companies (Consolidation) Act, 1908 (*n*), of a special resolution

(*i*) 7 Will. 4 & 1 Vict. c. 83.

(*k*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 46. As to recovery of penalties, see pp. 373 *et seq.*, *post*.

(*l*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 11; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161.

(*m*) This would include a rural authority having the necessary urban powers.

(*n*) 8 Edw. 7, c. 69, which repeals and consolidates the Companies Act, 1862 (25 & 26 Vict. c. 89), and Acts amending it; see title COMPANIES, Vol. V., p. 259.

SECT. 7. Sale of Undertaking to Local Authority.

of the members passed in the manner provided by that Act, and, in the case of any other company, of a resolution passed by a majority of three-fourths in number and value of the members present, either personally or by proxy, at a meeting specially convened with notice of the business to be transacted (*o*).

Compulsory purchase.

636. In addition to this power of purchase by agreement, local Acts of Parliament have sanctioned the compulsory acquisition of gas undertakings by local authorities (*p*), the price to be fixed by arbitration to be carried out either under the provisions of the Lands Clauses Acts (*q*) or the Arbitration Act, 1889 (*r*).

Where the gas undertaking extends beyond the district of the council so authorised to purchase, a clause is commonly inserted providing that, if the local authority of the district so beyond that of the purchasing council desire to purchase the gasworks and plant in their area, the purchasing council shall not oppose any application to Parliament for that purpose, except in detail, and provision is made for fixing the price of such works and plant by agreement or arbitration (*s*). In assessing the price to be paid for such gasworks

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 162. It would appear that the power conferred by this section is limited to companies whose area of supply is comprised within the district of the urban authority, and might not extend to companies who have powers and privileges outside as well as inside the district. It applies, however, to both statutory and non-statutory undertakings. On the purchase of these powers and privileges the authority are relieved from the bar against supplying gas contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161, and can then supply gas under that section, and they can probably exercise the rights, powers, and privileges which they purchase. As to the power of the Local Government Board by provisional order to amend and alter a local gas Act after such purchase, see *ibid.*, s. 303. It would seem that an agreement to purchase the rights, powers, and privileges of the company would include the goodwill of the undertaking, and its value would have to be considered by an arbitrator in fixing the price; see *Re Hucknall-under-Huthwaite Urban District Council and South Normanton, Blackwell and Hucknall-under-Huthwaite Gas Co.* (1905), 69 J. P. 329, C. A. Reference may be made to the cases of *Kingston Light, Heat, and Power Co.* v. *Kingston Corporation* (1904), 20 T. L. R. 448, P. C. As to the payment of costs of arbitration under an agreement for sale, see *Malvern Urban District Council* v. *Malvern Link Gas Co.* (1900), 83 L. T. 326, C. A.; *Hamilton Gas Co., Ltd.* v. *Hamilton Corporation*, [1910] A. C. 300, P. C.

(*p*) This is commonly done by a Bill promoted by the local authority, and is more commonly sanctioned by Parliament in the case of companies having no statutory powers than in the case of those which have. In the case of the former, if they apply to Parliament for statutory powers, a clause is not uncommonly inserted, at the instance of the local authority, providing that, if the authority promote a Bill for the purchase of the undertaking, the company will not oppose it, except as to the details thereof, and providing that the company shall not claim any enhanced value by reason of having obtained statutory powers.

(*q*) 8 & 9 Vict. c. 18, and Acts amending that Act; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1, 78.

(*r*) 52 & 53 Vict. c. 49; see title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*s*) See, for example, Model Bills and Clauses, 1910, Miscellaneous Clause, 9. The following is the form of clause:—"If at any time after the passing of this Act any local authority whose district is beyond the district of the council, but as to the whole or any part thereof within their limits for the supply of gas, shall give not less than six months' notice in writing to the council of their desire to purchase such portion of the gasworks and plant of the council as is contained

SECT. 7. Sale of Undertaking to Local Authority.

and plant, the arbitrator ought not, in the absence of provision in the special Act, to allow any compensation in respect of the severance of the mains and works in the outside area from the other mains and works, or in respect of the loss of revenue caused by the cessation of power to supply gas within the outside area (*t*). In special Acts authorising the purchase of gas undertakings a clause is sometimes inserted providing that the powers in regard to the manufacture of gas engines, stoves, ranges, pipes, and other gas accessories shall not be transferred (*a*).

Part II.—Works and Lands.

SECT. 1.—*Construction of Works* (*b*).

General powers.

637. The special Act or order commonly empowers the undertakers upon the land therein specified to erect, maintain, alter, improve, enlarge, extend, and renew or discontinue gasworks, retorts, gasometers, mains, pipes, stopcocks, machinery, and other works and apparatus and conveniences, and to do all other such acts as may be proper for making and storing gas and for supplying gas within the specified limits. It also empowers them to make, store, and supply gas accordingly, and to manufacture, sell, provide, and deal in coke, tar, and all other residual products or refuse of any materials employed in or resulting from the manufacture of gas (*c*). This power, however, does not authorise them to interfere with the rights of owners of other property, or to cause

within the district of any such local authority, and shall obtain the consent of the Local Government Board to such purchase, and shall apply to Parliament or the Local Government Board for power to purchase such portion of the gasworks and plant of the council (except the mains and pipes, or other apparatus which shall be necessary for supplying with gas any other part of the limits of the council for the supply of gas), and to supply gas within such district, then it shall not be lawful for the council to oppose such application (except as to the details thereof), and if such powers of purchase and supply be granted, the council shall sell and such local authority shall purchase the portion of the gasworks and plant of the council (except as aforesaid) within the district of such local authority, at such price, being a sum in gross, and upon such terms and conditions as shall be fixed in default of agreement by arbitration under the provisions of the Lands Clauses Acts. Any such purchase shall be deemed to be a purpose of the Public Health Act, 1875, except so far as the same may be otherwise provided for by Parliament. The council shall apply the proceeds of any sale under this section in the same manner as they are required to apply money received from sales of land under this Act. Provided that after the completion of such purchase all obligations on the part of the council to supply gas within the district of the purchasing authority shall cease and determine."

(*t*) See *Re Wolstanton United Urban District Council and Burslem Corporation* (1907), 72 J. P. 28; and compare *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board*, [1893] A. C. 444; *Dudley Corporation* v. *Dudley, Stourbridge and District Electric Traction Co.* (1907), 97 L. T. 556, H. L.; *Hamilton Gas Co., Ltd.* v. *Hamilton Corporation*, [1910] A. C. 300, P. C.

(*a*) Model Bills and Clauses, 1910, Miscellaneous Clauses, 11.

(*b*) As to the rating of gasworks, see title RATES AND RATING.

(*c*) Model Gas Bill, 1910, clause 16.

any nuisance (*d*). They may, however, in certain cases and on certain conditions interfere with telegraph lines and works (*e*)

Restriction of works to specified lands.

638. In every special Act and provisional order authorising a gas undertaking, unless there is express provision to the contrary, the land which may be used by undertakers for the purpose of manufacturing gas or any residual products must be specified, and the undertakers may not manufacture gas or any residual product except upon such land, neither may they store gas except upon land described in the special Act or order in that behalf without the previous consent in writing of the owner, lessee, and occupier of every dwelling-house situated within 300 yards of the limits of the site where such gas is intended to be stored (*f*).

SECT. 2.—*Purchase and Taking of Land.*

Powers to acquire land.

639. If the undertakers desire to acquire land, whether voluntarily or otherwise, for the purposes of the undertaking, provision for this purpose must be made in the special Act or provisional order (*g*).

In special Acts.

In special Acts the Lands Clauses Acts, wholly or in part, and with or without variations, are commonly incorporated (*h*), and provision may be made for the acquisition of the land required for the purposes of the undertaking either compulsorily or by agreement (*i*). In addition to the land authorised to be acquired otherwise than by agreement, or in addition to the land which may be used for manufacturing gas or residual products, undertakers are commonly authorised by the special Act to purchase, take, and hold (by agreement, but not otherwise) any other lands and hereditaments, not exceeding a limited number of acres, which they may require for the purposes of their works; but they are prohibited from creating or permitting a nuisance on any such lands, and

(*d*) Thus they may not interfere with ancient lights, nor may they in excavating for their works cause a subsidence of adjoining land by draining away running silt (*Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A., approved in *Batcheller* v. *Tunbridge Wells Gas Co.* (1901), 84 L. T. 765). As to nuisances, see Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 9; and pp. 359 *et seq.*, *post*.

(*e*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 7, amending Telegraph Act, 1863 (26 & 27 Vict. c. 112) s. 8. This applies generally to statutory undertakings; see title TELEGRAPHS AND TELEPHONES.

(*f*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 5, which Act applies to every gas undertaking authorised by special Act or provisional order passed after it, save where the provisions are expressly varied. The Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 7, contains like restrictions in very similar words, but these restrictions cannot be varied in the order; see also Model Gas Bill, 1910, clause 17, and for the standing orders relating thereto, see p. 311, *ante*.

(*g*) There are no provisions in the Gasworks Clauses Acts, 1847 (10 & 11 Vict. c. 15) and 1871 (34 & 35 Vict. c. 41), authorising the purchase of land by agreement or otherwise.

(*h*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

(*i*) The land authorised to be acquired compulsorily is commonly specified in the schedule to the special Act.

SECT. 2. Purchase and Taking of Land.

these lands must not be used for manufacturing gas or residual products (*j*).

In provisional orders.

640. In provisional orders under the Gas and Water Works Facilities Act, 1870 (*k*), it is necessary that the Lands Clauses Acts be incorporated, save where they are expressly varied or excepted by the order, but the provisions with respect to the purchase and taking of land otherwise than by agreement (*l*) and with respect to the entry upon lands by the promoters of the undertaking are excepted (*m*). For the purposes of this incorporation the provisional order is deemed the special Act (*n*). No such provisional order may contain any provision empowering the undertakers or any other person to acquire any lands otherwise than by agreement, or to acquire any lands, even by agreement, except to the extent limited in the order (*o*).

Power to acquire easements from limited owners.

641. When the Lands Clauses Acts are incorporated, and the Gasworks Clauses Act, 1871 (*p*), is applicable, persons empowered by the Lands Clauses Acts to sell and convey or release lands may, subject to the provisions of these Acts, grant to the undertakers any easement, right, or privilege, not being an easement of water, required for the purposes of the special Act in, over, or affecting any such lands, and the provisions of these Acts with respect to lands and rentcharges, so far as the same are applicable, extend and apply to such grants or to such easements, rights, or privileges (*q*).

Power to sell superfluous lands.

642. Undertakers are commonly empowered, and in some cases are required, to sell and dispose of lands which they have acquired for the purposes of the undertaking, and which are no longer required for these purposes. These are commonly referred to as superfluous lands, and the Lands Clauses Consolidation Act, 1845 (*r*), contains a group of clauses dealing with such lands. If all these clauses are incorporated, the undertakers will be required, at the expiration of a prescribed period, to sell all superfluous lands (*s*). The section requiring the undertaker to sell such lands is often omitted in special Acts and provisional orders. The Gasworks Clauses Act, 1871 (*t*), however, authorises the undertakers to sell

(*j*) Model Gas Bill, 1910, clause 17. As to dealing with such lands, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26—31; and see also title WATER SUPPLY; as to the liability of the undertakers to proceedings for nuisance, see p. 322, *ante*, and pp. 359 *et seq.*, *post*.

(*k*) 33 & 34 Vict. c. 70.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 16—68.

(*m*) *Ibid.*, ss. 84—89.

(*n*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 10.

(*o*) *Ibid.*, s. 7. A provisional order authorising the compulsory purchase and taking of lands may, however, be obtained by local authorities under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176, for the purposes of that Act, and gas supply may be one of such purposes (*ibid.*, s. 161); and see p. 320, *ante*.

(*p*) 34 & 35 Vict. c. 41.

(*q*) *Ibid.*, s. 10.

(*r*) 8 & 9 Vict. c. 18, ss. 127—132.

(*s*) *Ibid.*, s. 127; and see Model Gas Bill, 1908, clause 18, and title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26 *et seq.*

(*t*) 34 & 35 Vict. c. 41, s. 6. As to the undertakings to which the Act is applicable see pp. 309, 310, 318, *ante*.

and dispose of any lands which are vested in them, or which they are authorised to purchase, or which they may thereafter acquire, and which shall not be required for the purposes of the undertaking; and it makes certain sections of the Lands Clauses Consolidation Act, 1845 (*u*), applicable to any such sale. It also empowers the undertakers from time to time to sell and dispose of any works, buildings, or erections on any lands belonging to them which shall not be required for the purposes of the undertaking (*v*).

Redemption of tithe rentcharge.

643. In all cases where land charged with rentcharge in lieu of tithes is taken for the construction of gasworks, the undertakers must, as soon as they are in possession of the land, and before it is applied to such construction, apply to the Tithe Commissioners to order the redemption of the rentcharge for a sum of money equal to twenty-five times the amount thereof (*a*).

SECT. 3.—*Laying of Pipes.*

SUB-SECT. 1.—*In General.*

Laying of pipes.

644. The power to lay pipes in streets and highways may be conferred expressly by special or other Act, or it may be implied from a general power conferred by statute to light the streets (*b*). It is usually granted expressly by incorporating in the special Act the clauses of the Gasworks Clauses Act, 1847 (*c*), entitled "with respect to the breaking up of streets for the purpose of laying pipes." In modern Acts the powers therein have been extended by a clause authorising the undertakers in certain events to lay pipes in private roads for the supply of gas to houses abutting thereon (*d*). When gas undertakers are authorised to supply gas in bulk outside their authorised area, a proviso is commonly

(*u*) *I.e.*, Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 128—132. In provisional orders s. 127 (*ibid.*) will be incorporated unless expressly excluded; see Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 10. It is commonly excluded in the case of provisional orders granted to local authorities.

(*v*) See p. 324, *ante*.

(*a*) Tithe Act, 1878 (41 & 42 Vict. c. 42), s. 1. The redemption money, with the expenses incident to the redemption, is to be paid to the Commissioners, within a time to be fixed by them, and is applied by them (*ibid.*); see also title ECCLESIASTICAL LAW, Vol. XI., p. 750.

(*b*) Thus, by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161, urban authorities are authorised to contract for the supply of gas for lighting streets and to provide lamps and lamp-posts and other apparatus necessary for lighting the same, but no express power to break up the streets to lay the pipes is conferred. See also Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 57, and p. 309, *ante*.

(*c*) 10 & 11 Vict. c. 15, ss. 6—12; see pp. 318, 319, *ante*. For forms of licence to break up roads, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 421, 426.

(*d*) See note (*n*), p. 327, *post*. A clause has also been inserted in some special Acts authorising the undertakers to lay down pipes for the purpose of procuring, conducting, or disposing of any oil or other materials used by them in or resulting from any manufacture of gas or any residual products, and for this purpose the above-mentioned sections of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), are made applicable; see, for example, Pontefract Corporation Act, 1906 (6 Edw. 7, c. cxc.).

SECT. 3. Laying of Pipes.

inserted preventing them from laying pipes or interfering with streets beyond such area (*e*).

SUB-SECT. 2.—*Under Gasworks Clauses Acts.*

In streets and public places.

645. When the Gasworks Clauses Act, 1847 (*f*), is incorporated in any special Act or order, the undertakers, by virtue of its provisions, may, subject to certain superintendence, open and break up the soil and pavement of the several streets and bridges (*g*) within the limits of such special Act or order (*h*). The term "street" includes any square, court or alley, highway, lane, road, thoroughfare or public passage, or place within these limits (*i*). They may also open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for these purposes they may remove and use all earth and materials in and under such streets and bridges (*h*). They may also in such streets erect any pillars, lamps, and other works, and do all other acts which they shall from time to time deem necessary for supplying gas to the inhabitants of the district within the same limits (*h*).

Compensation for damage.

646. In the execution of these powers and of the powers granted to the undertakers by the special Act, they must do as little damage as may be, and make compensation for any damage which may be done in the execution of such powers (*k*).

(*e*) Model Gas Bill, 1910, clause 35.

(*f*) 10 & 11 Vict. c. 15.

(*g*) This includes an iron bridge of a railway company carrying a public road over the railway, but the undertakers may not cut into the girders (*Taff Vale Rail. Co.* v. *Cardiff Gas Light and Coke Co.* (1907), 71 J. P. 350; and compare *Glasgow Corporation* v. *Glasgow and South Western Rail. Co.*, [1895] A. C. 376). As to the validity of an agreement entered into between a gas and railway company, in connection with laying a gas main over a bridge and made in ignorance of the law, see *Gas Light and Coke Co.* v. *Metropolitan Rail. Co.* (1892), 9 T. L. R. 98.

(*h*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 6. As to superintendence, see p. 327, *post*. As to the liability of companies for breaking up streets without these powers, see p. 307, *ante*. In some gas Acts the consent of the road authority is required before breaking up the streets, but if once given the gas company may by the terms of the Act have power to break up the streets for the purpose of laying down other pipes or doing other works required by the Act (*Dover Gas Light Co.* v. *Dover Corporation* (1855), 7 De G. M. & G. 545, C. A.).

(*i*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 3. An uninclosed tract of land by the seashore above mean high-water mark, and used by the inhabitants of adjoining villages for walking, but by no defined track, is not a street within the meaning of this definition (*Maddock* v. *Wallasey Local Board* (1886), 55 L. J. (Q. B.) 267). As to definition of "street" in other connections, see title HIGHWAYS, STREETS AND BRIDGES.

(*k*) Such damage includes the breakage of a window by stones flying up during the breaking up of the street (*Hornby* v. *Liverpool United Gas Light Co.* (1883), 47 J. P. 231). In that case an action was brought to recover the compensation. The compensation will usually be recoverable under the Lands Clauses Acts if incorporated. The undertakers may also be liable for the negligent acts of their servants in laying the pipes (*Ibid.*; *Scott* v. *Manchester*

SECT. 3. Laying of Pipes.

Pipes not to be laid in private land.

647. The undertakers are neither authorised nor empowered by the Gasworks Clauses Act, 1847 (*l*), to lay down or place any pipe or other works into, through, or against any building (*m*), or in any land not dedicated to public use, without the consent of the owners and occupiers thereof (*n*). They may, however, at any time enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe has been already lawfully laid down or placed in pursuance of any statutory powers, and may repair or alter any pipe so laid down (*o*).

Notice before opening streets etc.

648. Before the undertakers proceed under these powers to open or break up any street, bridge, sewer, drain, or tunnel, they must give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer, notice in writing of their intention to open or break up the same, not less than three clear days before beginning such work, except in case of emergency arising from defects in any of the pipes or other works, and then as soon as possible after the beginning of the work or the necessity for the same shall have arisen (*p*).

Superintendence of breaking up street.

649. No street, bridge, sewer, drain, or tunnel may, except in such case of emergency, be opened or broken up except under the superintendence of the persons having the control or management thereof, or of their officer, and according to such plan as shall be approved of by these persons or their officer, or in the case of

Corporation (1856), 1 H. & N. 59; affirmed (1857) 2 H. & N. 204, Ex. Ch.). Doing as little damage as may be does not mean doing the work without any damage, but means that in doing the work they must take care to do as little damage as possible; compare *R.* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1853), 2 E. & B. 466, 474; *Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544, *per* JESSEL, M.R., at p. 549.

(*l*) 10 & 11 Vict. c. 15, s. 7.

(*m*) Arches under a street used as cellars in connection with adjoining premises are such buildings (*Thompson* v. *Sunderland Gas Co.* (1877), 2 Ex. D. 429, C. A.); and so would be the structure of a railway bridge as distinct from its surface (*Taff Vale Rail. Co.* v. *Cardiff Gas Light and Coke Co.* (1907), 71 J. P. 350; *Glasgow Corporation* v. *Glasgow and South Western Rail. Co.*, [1895] A. C. 376); see also *Meek* v. *Langdon* (1862), 37 L. T. Jo. 181 (a case under the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90)), and p. 329, *post*.

(*n*) As, for example, a private passage belonging to the owners of adjoining houses (*Bellamy* v. *Liverpool United Gas Light Co.* (1904), 68 J. P. 540). Where the occupiers of houses along a private road were to have the full use of the road as if it were a public road, it was held that the undertakers might lay gas pipes along such road to supply gas to some of the occupiers who desired them to do so (*Selby* v. *Crystal Palace District Gas Co.* (1862), 31 L. J. (CH.) 595, C. A.). In modern Acts a clause is commonly inserted providing that the undertakers may, on the application of the owner or occupier of any premises within the limits of the Act abutting on or being erected in any street laid out but not dedicated to public use, supply such premises with gas, and may lay down, take up, alter, relay, or renew in, across, or along such street, such pipes and apparatus as may be requisite or proper for furnishing such supply. Compare Model Water Bill, 1910, clause 23). As to restraining the laying or continuance of pipes in private streets, see *Goodson* v. *Richardson* (1874), 9 Ch. App. 221; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 233; and for a form of agreement authorising the laying of pipes, see Encyclopædia of Forms and Precedents, Vol. XV., p. 260. Compare also p. 308, *ante*.

(*o*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 7.

(*p*) *Ibid.*, s. 8. For definition of "street," see p. 326, *ante*.

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any difference respecting such plan, then according to a plan to be settled by two justices (*q*). The plan should show the intended position of the pipes in the road both as regards depth and lateral position (*r*). The justices may, on the application of the persons having the control or management of any such sewer or drain, or of their officer, require the undertakers to make such temporary or other works as they may think necessary for guarding against any interruption of the drainage during the execution of any works which interfere with the sewer or drain. If the persons having such control or management as aforesaid and their officer fail to attend at the time fixed for the opening of any such street, sewer, drain, or tunnel, after having had notice of the undertakers' intention as aforesaid, or shall not propose any plan for breaking up or opening the same, or shall refuse or neglect to superintend the operation, the undertakers may perform the work specified in the notice without the superintendence of such persons or their officer (*r*).

Reinstatement of streets etc.

650. When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they must with all convenient speed complete the work for which the same shall be broken up and fill in the ground, and reinstate and make good the road or pavement, or the sewer, drain, or tunnel so opened or broken up, and carry away the rubbish thereby occasioned. They must at all times, whilst the road or pavement shall be so opened or broken up, cause the same to be fenced or guarded, and cause a light sufficient for the warning of passengers to be set up and maintained against or near such road or pavement where the same shall be open or broken up every night during which the same shall be continued or broken up. They must also keep the road or pavement which has been so broken up in good repair for three months after replacing and making good the same, and for such further time, if any, not being more than twelve months in the whole, as the soil so broken up shall continue to subside (*s*).

Penalties.

651. If the undertakers open or break up any street or bridge, or any sewer, drain, or tunnel, without giving the prescribed notice, or in a manner different from that which shall have been approved of or determined as aforesaid, or without making such temporary or other works as aforesaid when so required, except in the cases in which the undertakers are authorised to perform these works without any superintendence or notice, or if the undertakers make any delay in completing any such work, or in filling in the ground, or

(*q*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 9. For definition of "street," see p. 326, *ante*.

(*r*) *East Molesey Local Board* v. *Lambeth Waterworks Co.*, [1892] 3 Ch. 289, C. A.; *Edgware Highway Board* v. *Colne Valley Water Co.* (1877), 46 L. J. (CH.) 889. These decisions were given upon the meaning the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 31, which is in the same terms as the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 9. In these cases it was also decided that a difference does not arise until the road authority has itself proposed a modification of the plan. If it merely disapproves the undertakers may proceed. As to orders of justices generally, see title MAGISTRATES.

(*s*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 10; compare Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 79—83.

in reinstating and making good the road or pavement, or the sewer, drain, or tunnel so opened or broken up, or in carrying away the rubbish occasioned thereby, or if they neglect to cause the place where the road or pavement has been broken up to be fenced, guarded, and lighted, or neglect to keep the road or pavement in repair for the space of three months next after the same is made good, or such further time as aforesaid, they are liable to forfeit to the persons having the control or management of the street, bridge, sewer, drain, or tunnel in respect of which such default is made a sum not exceeding £5 for every offence, and an additional sum of £5 for each day during which any such delay as aforesaid shall continue after they shall have received notice thereof (*t*). In addition to this penalty, they are liable at common law in respect of special damage occasioned to any person by reason of their failure properly to replace and make good the road where such failure causes a public nuisance on the highway (*u*). Further, if any such delay or omission takes place, the persons having the control or management of the street, bridge, sewer, drain, or tunnel in respect of which the delay or omission takes place may cause the work so delayed or omitted to be executed, and the undertakers must repay them the expenses of executing the same (*a*). These expenses are recoverable in the same manner as damages are recoverable before two justices under the Gasworks Clauses Act, 1847, or the special Act (*b*).

Common law liability.

SUB-SECT. 3.—*Under Lighting and Watching Act.*

652. The Lighting and Watching Act, 1833 (*c*), does not in express terms empower the authorities having the execution of the Act to break up the roads and streets in order to lay gas pipes and mains, but the power to do so is clearly implied (*d*). Those authorities or persons who supply gas under this Act for lighting any highway, street or place, or any house, manufactory, building or other premises within the limits of any parish adopting the provisions of the Act, are expressly empowered to lay iron pipes, of such breadth, depth and dimensions, and in such manner as they shall think expedient under the roads, streets, and other public places within the said limits for the purpose of carrying off the washings or waste liquids which may arise in the prosecution of the said works, and these authorities or persons must do as little

Powers as to laying pipes.

To carry off gas washings.

(*t*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 11. As to cases where the local authority undertake to reinstate, see *Commercial Gas Co.* v. *Poplar Borough Council* (1906), 70 J. P. 178; *Cressy* v. *South Metropolitan Gas Co.* (1906), 70 J. P. 405; *Hartley* v. *Rochdale Corporation*, [1908] 2 K. B. 594. As to recovery of penalties, see pp. 337 *et seq.*, *post.*

(*u*) *Goodson* v. *Sunbury Gas Consumers' Co.* (1896), 75 L. T. 251; and see Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 29.

(*a*) *Ibid.*, s. 12.

(*b*) *Ibid.*, ss. 12, 40; and see pp. 373 *et seq.*, *post.*

(*c*) 3 & 4 Will. 4, c. 90.

(*d*) As to these authorities and their powers generally, see pp. 307, 308, *ante*, and compare p. 313, *ante*. They have power to put up lamps and cause the same to be lighted with gas, and there are also restrictions and regulations as to laying pipes (see Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 46, 47, and 51).

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damage as may be in laying such pipes and immediately repair, at their own expense, all such damage (*e*).

Consent for laying on private premises.

Nothing in the Act empowers the authorities having the execution of the Act, or persons contracting with them for lighting with gas such roads, streets, and public places, to carry or lay any pipes, cocks, or branches from any mains or pipes, against, into, or through any dwelling-house, manufactory, public or private building, or to continue the same, without the consent in writing of the respective owner or occupier thereof for the time being, and nothing enables these authorities or persons to enter into or upon any private lands or grounds without the consent in writing of the owner or occupier of such lands or grounds for that purpose first had and obtained (*f*).

Alteration of position of pipes by owner.

It is also provided that in case the soil, pitching, or pavement of any road or way, for the purpose of laying any gas main or pipe along, under or across the same, be broken up, with the consent of the owner of the soil for the time being, and after the same shall have been so laid and placed such owner desires to have the same removed, he may at any time or times, at his own cost, alter and vary the position of the main or pipe and relay the same, so that no damage be done thereby to authorities or persons contracting with them, and they be not thereby prevented from or obstructed in lighting any public or private lamp, unless such damage or obstruction be unavoidable (*g*).

Protection of water pipes.

653. Pipes or other conduits used or laid for the conveyance of gas in any road, street, or other place must be laid at the greatest practical distance, and when the width of the carriageway will allow thereof, at the distance of at least four feet from the nearest part of any water pipe laid down for the conveyance of water in any such road, street, or place, except in cases where it shall be unavoidably necessary to lay the gas pipes across any of the said water pipes, in which cases the gas pipes must be laid over the said water pipes at the greatest practical distance therefrom and must form therewith a right angle, and in such cases the gas pipe must be at least nine feet in length, so that no joint of any of the gas pipes shall be nearer to any part of the said water pipes than four feet at least (*h*). In laying down gas pipes, the contractors or other persons supplying gas may in no case join two or more gas pipes together previous to their being laid in the trench, but must lay each pipe as near as may be in its place in the trench, and in the trench properly form the jointing with the other pipes to be added thereto with proper and sufficient materials, and make and keep every such pipe and all pipes connected or communicating therewith and all screws, joints, inlets, apertures or openings therein airtight, and in every respect prevent the gas from escaping therefrom, upon pain of forfeiting for every offence the sum of £5 (*h*).

Pipes to be airtight.

(*e*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 49. Such pipes must not be laid so as to affect wells, sewers, or drains, or without the consent of the authority administering the Act (*ibid.*, and see pp. 359 *et seq.*, *post*).

(*f*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 46.

(*g*) *Ibid.*, s. 47.

(*h*) *Ibid.*, s. 51. As to the recovery of other penalties under this Act, see pp. 573 *et seq.*, *post*.

SECT. 4.—*Support to Works and Pipes.*

SECT. 4. Support to Works and Pipes.

Support.

654. There are no general provisions in the Gasworks Clauses Acts, 1847 (*i*) and 1871 (*k*), relating to support from mines and minerals. In the absence of special provisions, the right of support to the authorised works is deemed to be conferred on the undertakers as a necessary consequence of the right to make and maintain these works, at least in cases where the owner of the land is, by virtue of the special Act, entitled to compensation for the burden so imposed upon him (*l*).

Statutory right.

655. Where a local authority within the meaning of the Public Health Act, 1875 (*m*), constructs works for lighting under the powers of that Act or of any general or local Act or provisional order, they will be entitled to lateral and vertical support from mines and minerals, in respect of such works and all fixtures, pipes, fittings, or apparatus connected therewith, but subject to payment of compensation and to the other restrictions contained in the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (*n*), the provisions of which apply whether the land on, in, over, or under which such works, fixtures, pipes etc. are situated, is or is not vested in or occupied by the local authority, and is or is not wholly or partially dedicated to the public as a street, highway, or public place (*o*).

(*i*) 10 & 11 Vict. c. 15.

(*k*) 34 & 35 Vict. c. 41.

(*l*) *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1883), 52 L. J. (Q. B.) 629, C. A.; and compare *Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A.; *Mid and East Calder Gas-Light Co.* v. *Oakbank Oil Co., Ltd.* (1891), 18 R. (Ct. of Sess.) 788; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 55, 56. As to the law relating to mines and minerals generally, see title MINES, MINERALS, AND QUARRIES.

(*m*) 38 & 39 Vict. c. 55. As to local authorities, compare pp. 309, 313, *ante*.

(*n*) 46 & 47 Vict. c. 37. This Act incorporates, with adaptations, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18—27, being the clauses which relate to mines, but there is a saving in respect of rights acquired before the passing of the Act (see *Jary* v. *Barnsley Corporation*, [1907] 2 Ch. 600); and common law rights acquired by local authorities are not affected (*New Moss Colliery, Ltd.* v. *Manchester Corporation*, [1908] A. C. 117). See, generally, titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 319 *et seq.*; SEWERS AND DRAINS; WATER SUPPLY.

(*o*) Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3. The effect of this is that in case of gas mains and pipes laid in highways, the local authority may, if willing to pay compensation, prevent the owner of the minerals from working them so as to injure such mains and pipes, but the preparation of a map or plan as provided by the Act is a condition precedent to the right of the undertakers to recover damages for injuries to such mains and pipes (*South Staffordshire Waterworks Co.* v. *Mason & Sons* (1886), 56 L. J. (Q. B.) 255). As to dedication of streets and highways, see title HIGHWAYS, STREETS AND BRIDGES.

Part III.—The Supply of Gas.

SECT. 1. SECT. 1.—*General Powers and Duties.*

General Powers and Duties.

Duty to supply within limits of Act.

Discharge from such duty.

656. The special Act or order defines the area within which such Act or order shall be in force and have effect, and the area is commonly referred to as the limits of the Act or the limits of supply. Before the passing of the Gasworks Clauses Act, 1871 (*p*), undertakers were not in general compelled to supply gas to persons within that area (*q*), but by the provisions of that Act a duty to do so, subject to certain conditions, is imposed upon those undertakers to whom that Act applies (*r*). They may be relieved from this obligation in certain events. In cases where a supply of electricity is authorised in any area by any licence, order, or special Act, and within such area or part thereof gas undertakers by their Act or order are under any general or limited obligation to supply gas on demand, the Board of Trade may, upon the application of the gas undertakers, inquire into the circumstances of the case, and, if they are satisfied that any specified part of that area is sufficiently supplied with electric light, and that the supply of gas in such specified part has ceased to be remunerative to the gas undertakers, and that it is just that they should be relieved from the obligation to supply gas upon demand as aforesaid, may, in their discretion, make an order relieving the gas undertakers from their obligation within the specified part of such area, either wholly or in part, and upon such terms and conditions as they may think proper, and from and after the date of such order the gas undertakers will be so relieved accordingly (*s*).

Supply in bulk outside limits.

657. Undertakers are also frequently authorised by their special Act or order to contract with any local authority, company, or person beyond the limits of supply for a supply to them of gas in bulk; but only with the consent in writing of any local authority, company, or person supplying gas under parliamentary powers in that district, and such contracts are limited to a period of seven years (*t*).

(*p*) 34 & 35 Vict. c. 41. The Act was passed on the 13th July, 1871. As to the term "Special Act," see pp. 318, 319, *ante*.

(*q*) There was no compulsory supply required under the provisions of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15).

(*r*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), ss. 11, 24. As to when it is applicable, see p. 317, *ante*.

(*s*) Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 29, which also provides that the expenses of the Board of Trade in connection with any such inquiry or order are to be borne and paid by the gas undertakers upon whose application the inquiry or order was made; and see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 557, 581, 645.

(*t*) See Model Gas Bill, 1910, clause 35. As to the supply of apparatus, see p. 310, *ante*.

SECT. 2.—*Supply for Private Purposes.*

SUB-SECT. 1.—*Rights of Owners and Occupiers.*

SECT. 2. Supply for Private Purposes.

Compulsory supply.

658. Under the Gasworks Clauses Act, 1847 (*u*), undertakers are empowered from time to time to enter into any contract with any person for lighting or supplying with gas any private building, and for providing any person with pipes, burners, meters, and lamps, and for the repair thereof (*a*). Where the Gasworks Clauses Act, 1871, is also applicable (*b*) the undertakers must, upon being required so to do by the owner or occupier of any premises situated within twenty-five yards from any main of the undertakers or within such other distance as may be prescribed by the special Act or order, give and continue to give a supply of gas for these premises, under such pressure in the main as may be so prescribed, and they must furnish and lay any pipe that may be necessary for that purpose, subject, however, to the following conditions—namely, the cost of so much of any pipe for the supply of gas to any owner or occupier as may be laid upon the property of such owner or in the possession of such occupier, and of so much of any such pipe as may be laid for a greater distance than thirty feet from any pipe of the undertakers, although not on such property, shall be defrayed by such owner or occupier.

Every owner or occupier of premises so requiring a supply of gas must serve a notice upon the undertakers, at their office, specifying the premises in respect of which it is required and the day upon which it is required to commence, which must not be an earlier day than a reasonable time after the date of the service of the notice. He must also enter into a written contract with the undertakers (if so required by them), to continue to receive and pay for a supply of gas, for a period of at least two years, of such an amount that the rent payable for the same shall not be less than 20 per cent. per annum on the outlay incurred by the undertakers in providing any pipe to be provided by them for the purpose of the supply. He must also give to the undertakers (if so required) security for the payment to them of all moneys which may become due to them from him in respect of any pipe to be furnished by the undertakers and in respect of gas to be supplied by them (*c*).

Penalty for refusing supply.

659. Whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises within the limits of the special Act entitled to the same, either at all or under such pressure as is prescribed, they become liable to a penalty not exceeding 40*s.* for each day during which such default

(*u*) 10 & 11 Vict. c 15.

(*a*) *Ibid.*, s. 13. In recent special Acts this section has been amended by the insertion of the words "or any premises" after the words "private building," and also by the insertion of a proviso that every such contract entered into by the undertakers shall be alike in terms and amount under like circumstances to all consumers; see Model Gas Bill, 1910, clauses 1, 21. For forms of agreement, see Encyclopædia of Forms and Precedents, Vol. XV., pp. 256—259.

(*b*) As to the applicability of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), see p. 317, *ante*.

(*c*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 11. As to pressure, see p. 351, *post*.

SECT. 2. Supply for Private Purposes.

continues (*d*), but breach of their statutory duty to supply gas does not give the owner or occupier of premises any right to recover damages in respect of any loss he may thereby suffer (*e*). In modern special Acts a clause is commonly inserted empowering the undertakers to refuse to furnish a supply of gas to a person at new premises if he has previously quitted premises at which gas was supplied to him by the undertakers until he has paid all gas charges and meter rents due to them from him (*f*).

Quality of gas.

660. The quality of the gas supplied must, with respect to its illuminating power, be such as to produce, at the testing place prescribed in the special Act or order (*g*), a light equal in intensity to that produced by the prescribed number of sperm candles of six to the pound (*h*), and as to its purity, such gas must not exhibit any trace of sulphuretted hydrogen when tested according to the prescribed rules (*i*). A standard of heating power has been inserted in some of the latest Acts (*k*).

SUB-SECT. 2.—*Consumption by Meter.*

Meter to be supplied by undertakers.

661. Every consumer of gas supplied by the undertakers must, if required to do so by them, consume the gas by a meter duly stamped (*l*), being a legal meter as defined by statute (*m*). The undertakers must supply to any owner or occupier of premises within the limits of the special Act requiring the same a meter for registering gas supplied by them; but such owner or occupier is required, previous to receiving the meter, to give the undertakers security for payment to them of the price of the meter if he desires to purchase the same, or of the rent of the meter if he desires to hire the same (*n*). The undertakers are empowered to let on hire any meter

(*d*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36. Thus the company are liable to a penalty for improperly cutting off the supply (*Commercial Gas Co.* v. *Scott* (1875), L. R. 10 Q. B. 400). As to the recovery of penalties, see pp. 373 *et seq.*, *post*.

(*e*) *Clegg, Parkinson & Co.* v. *Earby Gas Co.*, [1896] 1 Q. B. 592, decided on the principle that where a general obligation is created by statute and a specific remedy is provided, that statutory remedy is the only one; and see *Johnston and Toronto Type Foundry Co.* v. *Consumers' Gas Co. of Toronto*, [1898] A. C. 447, P. C.

(*f*) See Model Gas Bill, 1910, clause 32.

(*g*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 12. As to testing generally, see p. 351, *post*. As to the term "special Act," see pp. 318, 319, *ante*.

(*h*) The number of candles prescribed usually varies from fourteen to sixteen.

(*i*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 12; for the rules as to testing, see *ibid.*, Sched. A, Part II. In the case of the metropolitan and other gas companies there were also imposed restrictions as to sulphur and other sulphur compounds. These restrictions have in most instances been removed; see, for example, the Gas Companies (Removal of Sulphur Restrictions) Act, 1907 (7 Edw. 7, c. v.). The special Act usually prescribes a minimum pressure at which the gas must be supplied; see Model Gas Bill, 1910, clause 26.

(*k*) Gas Light and Coke Company's Act, 1909 (9 Edw. 7, c. lxxxvii.), s. 39.

(*l*) After the 13th October, 1870, all meters used for sale of gas are required to be stamped (Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 17), as amended by the Sale of Gas Act, 1860 (23 & 24 Vict. c. 146), s. 1).

(*m*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 13.

(*n*) *Ibid.*, s. 14. For a form of agreement, see Encyclopædia of Forms and Precedents, Vol. XV., p. 255.

for ascertaining the quantity of gas consumed or supplied, and any fittings thereto, for such remuneration in money, and on such terms with respect to the repair of such meter and fittings, and for securing the safety and return of the meter, as may be agreed upon between the hirer and the undertakers (*o*). Such remuneration is recoverable in the same manner as the rents and sums due to the undertakers for gas (*p*).

Not liable to distress.

These meters and fittings are not subject to distress, nor to the landlord's remedy for rent of the premises where the same may be used, nor to be taken in execution under any process of a court of law or equity or any proceedings in bankruptcy against the persons in whose possession the same may be (*o*).

Repair of hired meters.

662. The undertakers must at all times, at their own expense, keep all meters let for hire by them to any consumer in proper order for correctly registering gas, and in default of their so doing the consumer is not liable to pay rent for the same during such time as such default continues. The undertakers, for this purpose, are entitled to have access to, and are at liberty to remove, test, inspect, and replace any such meter at all reasonable times (*q*).

Consumer's duties as to meter.

663. A consumer renders himself liable to a penalty not exceeding 40*s.* for each offence if he connects any meter with any pipe through which gas is supplied by the undertakers to the meter, or disconnects any meter from any such pipe, without giving to the undertakers not less than twenty-four hours' notice in writing of his intention so to do (*r*). Every consumer must at all times, at his own expense, keep every meter which belongs to him, whereby

(*o*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 18. The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 14, contains the following similar provision :—"The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied and any fittings for the gas, for such remuneration in money as shall be agreed upon between the undertakers and any person to whom the same may be so let, and such remuneration shall be recoverable in the same manner as the rents or sums due to the undertakers for gas, and such meters and fittings shall not be subject to distress, or to the landlord's hypothec for rent of the premises where the same may be used, nor to be taken in execution under any process of a court of law or equity or any *fiat* or sequestration in bankruptcy against the person in whose possession the same may be." This provision is repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), except so far as incorporated in special Acts to which the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), does not apply. As to such application, see p. 317, *ante*. The words "any fittings for the gas" are wider than those used in the later Act, and would include a gas stove, which would, therefore, be protected from distress (*Gas Light and Coke Co.* v. *Hardy* (1886), 17 Q. B. D. 619, C. A.; *Gas Light and Coke Co.* v. *Smith & Co.* (1886), 3 T. L. R. 15). In cases where the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), is incorporated, it would seem that the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 14, is not applicable. When that is so, special power is required to enable the undertakers to supply gas stoves, engines, and such like apparatus; see p. 310, *ante*. The clause giving that power usually exempts the apparatus from distress. A provision has also been inserted in some cases that gas engines shall not become fixtures, but shall remain the property of the company (compare *Crossley Brothers, Ltd.* v. *Lee*, [1908] 1 K. B. 86). See also title DISTRESS, Vol. XI., pp. 132 *et seq.*

(*p*) As to such recovery, see p. 339, *post*.

(*q*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 19; and see Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 15, pp. 336, 337, *post;* and compare pp. 347 *et seq.*, *post*.

(*r*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 15.

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any gas of the undertakers is registered, in proper order for correctly registering such gas, and in default of his so doing the undertakers may cease to supply gas through that meter. The undertakers are entitled to have access to, and to be at liberty to take off, remove, test, inspect, and replace any such meter at all reasonable times, the same to be done at the expense of the undertakers if the meter be found in proper order, but otherwise at the expense of the consumer (*s*).

Prepayment meters.

664. Undertakers have also been authorised to supply gas by means of a prepayment meter, at a charge not greater than for gas supplied through any other kind of meter or by any other method of supply. The charge for the hire of any prepayment meter and fittings to be used therewith is based on the quantity of gas supplied through the meter, and a maximum rate per 1,000 cubic feet is prescribed, such charge to include the providing, letting, fixing, and maintenance of the meter and fittings, cost of collection, and all other costs (*t*). If the meter is hired without fittings a maximum charge is also prescribed (*a*).

Register of meter.

665. The register of the meter is *primâ facie* evidence of the quantity of gas consumed, and in respect of which any rent is charged and sought to be recovered by the undertakers; but if the undertakers and the consumer differ as to the quantity consumed, such difference may be determined, on the application of either party, by two justices, who may also order by which of the parties the costs of the proceedings before them shall be paid: the decision of the justices is final and binding on all parties (*b*). Provision has been made in modern special Acts fixing a period within which the erroneous registration shall be deemed to have first arisen (*c*).

Inspection of meter and fittings.

666. Any officer appointed by the undertakers may at all reasonable times enter any building or land lighted with gas supplied by the undertakers in order to inspect the meters, fittings,

(*s*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 17.

(*t*) Model Gas Bill, 1910, clause 22; compare Metropolis Gas (Prepayment Meter) Act, 1900 (63 & 64 Vict. c. cclxxii.), and see p. 386, *post*. A prepayment meter means any meter or appliance by which the quantity of gas supplied is regulated according to the amount of money prepaid. For a form of hiring agreement, see Encyclopædia of Forms and Precedents, Vol. XV., p. 257.

(*a*) In the Model Gas Bill this is 10 per cent. per annum on the cost of the meter.

(*b*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 20; for an example of such proceedings, see *Cresswell* v. *Gas Light and Coke Co.* (1897), 61 J. P. 699. As to penalties for altering or injuring meters, see *ibid.*, s. 38, and p. 356, *post*; and compare p. 350, *post*. As to recovery of penalties, see pp. 373 *et seq.*, *post*. As to orders of justices, generally, see title MAGISTRATES.

(*c*) The Model Gas Bill, 1910, clause 34, provides that in the event of any meter used by a consumer of gas being tested in manner provided by the Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), and being proved to register erroneously within the meaning of the said Act, such erroneous registration shall be deemed to have first arisen during the then last preceding quarter of the year, unless it be found to have first arisen during the then current quarter. The amount of the allowance to be made to or of the surcharge to be made upon the consumer by the company shall be paid by or to the company to or by the consumer as the case may be, and shall be recoverable in the like manner as gas charges are recoverable by the company.

and works for the supply of gas, and for the purpose of ascertaining the quantity of gas consumed or supplied; and any person who hinders such officer from entering and making such inspection at any reasonable time becomes liable for every such offence to forfeit to the undertakers a sum not exceeding £5 (*d*).

SUB-SECT. 3.—*Pipes between Mains and Meters.*

Power to specify pipes.

667. Modern special Acts contain additional provisions in regard to the laying of pipes between the gas mains and meters for the purpose of enabling the undertakers to ensure a satisfactory supply of gas to their consumers. These provisions enable the undertakers to specify the size and material of the pipes, with the fittings thereof, which are to be laid by the consumer between the mains of the undertakers and the meter and (so far as the same are intended to be covered over) on the consumer's premises. Different classes of specification may be made, and a method for the publication of these specifications is provided. The position of the meter in new premises, or in connection with a new pipe, is required by such provisions to be as near as reasonably practicable to the main, but within the outside wall of the building, and power is given to the officer of the undertakers to inspect the pipes and meter, and if the pipes are not according to the specification, or the meter not placed in manner above mentioned, the undertakers may refuse to supply gas to the premises. In the event of a dispute on these matters, the person who is refused a supply has a right of appeal to a petty sessional court against the refusal, and the court is empowered to make such order as seems to them proper in the circumstances, and also to order which party is to pay the costs of the appeal (*e*).

SUB-SECT. 4.—*Price of Gas supplied.*

Price of gas.

668. The price to be charged for the gas supplied is regulated by the special Act or provisional order (*f*). In some cases the special Act merely prescribes a price per 1,000 cubic feet of gas supplied, which price the undertakers may not exceed (*g*). In the case of companies, as an alternative, a sliding scale may be

(*d*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 21. By the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 15, the clerk, engineer, or other officer duly appointed for the purpose by the undertakers may at all reasonable times enter any building or place lighted with gas supplied by the undertakers, in order to inspect the meters, fittings, and works for regulating the supply of gas, and for the purpose of ascertaining the quantity of gas consumed or supplied; and if any person hinders such officer from entering or making such inspection at any reasonable time, he is liable, for every such offence, to forfeit to the undertakers a sum not exceeding £5. This provision has been repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), except so far as incorporated in special Acts to which the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), does not apply.

(*e*) Model Gas Bill, 1910, clause 28. As to petty sessional courts, see title MAGISTRATES.

(*f*) In the case of provisional orders, the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 12, provides that the rents and rates shall not exceed the sums specified in the order and shall be subject to the regulations therein specified.

(*g*) Model Gas Bill, 1910, clause 19.

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prescribed. In such a case the Act fixes a standard price, which the company may increase or reduce according as the dividend payable by the company on the ordinary share capital or stock is reduced or increased above a fixed standard dividend (*h*). In the case of prepayment meters, it is commonly provided that the price charged for the gas must not be greater than for gas supplied to other private consumers (*i*).

SUB-SECT. 5.—*Security for Gas Charges.*

Security before and after supply given.

669. In addition to the right of the undertakers to require security for the payment of gas charges as a condition of giving a compulsory supply (*k*), they have power, after they have given a supply of gas for any premises, by notice in writing, to require the owner or occupier of these premises, within seven days after the date of the service of such notice, to give to them security for the payment of all moneys which may from time to time become due to them in respect of such supply, if the owner or occupier has not already given security, or if any security given has become invalid or insufficient. In case any such owner or occupier fails to comply with the terms of the notice, the undertakers may, if they please, discontinue the supply of gas to such premises so long as the failure continues (*l*).

Form of security.

670. When any owner or occupier is required by the special Act to give security to the undertakers, the security may be by way of deposit or otherwise, and of such amount as he and the undertakers agree on, or as, in default of agreement, may be determined, on the application of either party, by two justices, who may also order by which of the parties the costs of the proceedings before them shall be paid, and such decision is final and binding on all parties (*m*).

Interest on securities.

671. In modern special Acts a clause is commonly inserted requiring the undertakers to pay interest on securities made by way of deposit (*n*).

(*h*) Model Gas Bill, 1910, clause 20; and see p. 371, *post;* and generally, as to limitation of profits, pp. 365 *et seq.*, *post.* A common clause enables the company to allow discounts or rebates for prompt payment or to large consumers, provided all discounts or rebates shall be of equal amounts in like circumstances to all consumers, and notice of the effect of the provisions is indorsed on every demand note for gas charges.

(*i*) See p. 336, *ante.*

(*k*) As to which, see p. 333, *ante.*

(*l*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 11. As to when this Act applies, see p. 317, *ante.* As to form of security, see *infra.*

(*m*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 16. Security may also be required for the hire or purchase price of a meter (*ibid.*, s. 14; and see p. 334, *ante*), and probably also for the price or hire of gas fittings such as stoves, ranges, and engines, which such companies and corporations are authorised to sell, hire, or otherwise deal in (see p. 310, *ante*). As to orders of justices in general, see title MAGISTRATES.

(*n*) The Model Gas Bill, 1910, clause 29, provides that if any person is required by the company to give to them security for any supply of gas or for the payment of the price or rent of a meter, and such security is made by way of deposit, the company shall pay interest after the rate of £4 per cent. per annum on every sum of 10*s.* deposited by way of security for every six months during which the same remains in their hands.

SUB-SECT. 6.—*Recovery of Gas Rents and Charges.*

Variety of powers.

672. The undertakers have various powers conferred upon them for the recovery of gas rents and charges. These are—(1) cutting off the supply; (2) proceedings before a justice for a warrant to recover the sum due by distress; or (3) proceedings before a court of summary jurisdiction to recover the sum due as a penalty; and (4) proceedings before any court of competent jurisdiction.

Cutting off supply.

673. By the Gasworks Clauses Act, 1847, it is provided that if any person supplied with gas neglects to pay the rent due for the same to the undertakers, the undertakers may stop the gas from entering the premises of such person by cutting off the service pipe, or by such means as they shall think fit (*o*).

Warrant for distress.

674. By the Gasworks Clauses Act, 1871, it is provided that in case any person who shall have been supplied with gas neglects or refuses to pay the amount due in respect of the supply, any justice may issue his summons to such person requiring him to appear at a time and place named therein to show cause why the sum so demanded should not be paid; and if, on the appearance of such person, or in default of appearance, after proof of the service of the summons, either personally or at the last known place of abode or of business of such person, no sufficient cause can be shown to the contrary, any justice may issue his warrant of distress for the seizure and sale of the goods and chattels of such person for the recovery of the amount which may be proved before the justice to be due from such person, together with such costs, including the costs of cutting off the gas if the same shall have been cut off by the undertakers, as to the justice shall seem just and reasonable (*p*).

(*o*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16. It would appear that the right to cut off the supply is not limited to the particular premises in respect of which the default arises, but that the undertakers may stop the gas from entering any premises of a consumer who is in default in respect of one set of premises (compare *Montreal Gas Co.* v. *Cadieux*, [1899] A. C. 589, P. C., a case decided under a similar clause in a Canadian Gas Act; and see p. 356, *post*). Undertakers will be liable for damages caused by negligence in cutting off the supply (*Paterson* v. *Blackburn Corporation* (1892), 9 T. L. R. 55, C. A.).

(*p*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 23. This section comes under the heading "Supply of Gas to Owners and Occupiers of Premises." The right of distress under this section overrides the equitable rights of debenture-holders; a company on obtaining a justice's warrant may obtain leave to distrain notwithstanding that a receiver has been appointed (*Re Crosbie (Adolph), Ltd., Johnson and Hughes* v. *Crosbie (Adolph), Ltd.* (1909), 74 J. P. 25, applying the principle laid down as regards poor rates in *Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corporation* v. *Marriage, Neave & Co.*, [1896] 2 Ch. 663, C. A.; and compare *Gosling* v. *Gaskell*, [1897] A. C. 575). The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16, also provides that the undertakers may recover the rent due, if less than £20, together with the expense of cutting off the gas, and the costs of recovering the rent, in the same manner as any damages, for the recovery of which no special provision is made, are recoverable under this or the special Act, or, if the rent so due amount to £20 or upwards, the undertakers may recover the same, together with the expenses of cutting off the gas, by action in any court of competent jurisdiction. This provision has been repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), except so far as incorporated in special Acts to which the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), does not apply. Damages are recoverable summarily before two justices; see pp. 373 *et seq.*, *post*). As to proceedings before justices generally, see title MAGISTRATES.

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Recovery as a penalty.

675. By the Gasworks Clauses Act, 1871, it is also provided that if any person supplied with gas, or with any gas meter or fittings, by the undertakers neglects to pay to the undertakers the rent due for the gas, or the rent due to the undertakers for the hire or fixing of the meter, or any expenses lawfully incurred by the undertakers in cutting off the gas from the premises of such person, the undertakers may recover the sum due as a penalty under the Act—that is, by summary proceedings before two justices (*q*).

By action.

676. It is further provided by the same Act, that whenever any person neglects to pay any rent or sum due and payable by him to the undertakers, the undertakers may recover the same, with full costs of suit, in any court of competent jurisdiction, and this remedy is in addition to their other remedies for the recovery of such rent or sum (*r*).

Rights as to distress.

677. The power to recover gas rents by distress does not give the undertakers the rights of a landlord in the event of the consumer's bankruptcy, but certain special Acts allow the undertakers to recover sums due for gas by the same means as landlords may recover rent in arrear, and such a provision places them, as regards distress, in the same position as a landlord (*s*).

Prepayment meters.

678. In the case of prepayment meters, the undertakers commonly contract to supply a certain quantity of gas when a certain sum is placed in a receptacle attached thereto, of which they retain the key. If the money so placed in such receptacle is stolen, without negligence on the part of the consumer, the undertakers cannot recover from such consumer any sum for the gas so supplied to him (*t*).

Recovery from incoming tenant.

679. If any consumer of gas supplied by the undertakers leaves the premises where the gas has been supplied to him without paying the gas rent or meter rent due from him, the undertakers are not entitled to require from the next tenant of the same premises the payment of the arrears left unpaid by the former tenant, unless the incoming tenant has undertaken with the former tenant to pay or exonerate him from the payment of such arrears (*a*). A

(*q*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 40. This section comes under the heading in that Act, "Recovery of Gas Rents." As to recovering penalties, see pp. 373 *et seq.*, *post*. As to summary proceedings generally, see title MAGISTRATES.

(*r*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 41. This section also comes under the heading "Recovery of Gas Rents."

(*s*) *Re Roberts, Ex parte Hill* (1877), 6 Ch. D. 63, C. A.; *Re Fanshuw and Yorston, Ex parte Birmingham and Staffordshire Gas Light Co.* (1871), L. R. 11 Eq. 615; *Re Adams, Ex parte Birmingham Gaslight and Coke Co.* (1870), L. R. 11 Eq. 204; *Re Peake, Ex parte Harrison* (1884), 13 Q. B. D. 753, C. A.; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 294.

(*t*) *Edmundson* v. *Longton Corporation* (1902), 19 T. L. R. 15.

(*a*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 39. As to payment of such arrears before supplying the new premises of the defaulting consumer, see p. 334, *ante*. In certain metropolitan Acts there is a further proviso, namely, "or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee or mortgagee in possession or to the outgoing tenant of such premises a consideration for so doing." It has been held that the section so extended does not enable the

receiver appointed in the case of a debtor, or limited company, is not such an incoming tenant (*b*).

SUB-SECT. 7.—*Discontinuation of Supply and Removal of Fittings.*

Notice on quitting premises.

680. In most modern special Acts provision is made requiring consumers to give notice to the undertakers before quitting premises supplied with gas by meter by the undertakers, such notice to be in writing and signed by or on behalf of the consumer, and to be left or sent by post to the office of the company (*c*). In default of such notice the consumer is, by this provision, made liable to pay the undertakers the money accruing due in respect of such supply up to the next usual period for ascertaining the register of the meter on the premises supplied, or the date from which any subsequent occupier of such premises shall require the undertakers to supply gas to these premises, whichever shall first occur (*d*).

Removal of fittings.

681. In all cases in which a consumer of gas supplied by the undertakers ceases to require a supply of such gas, and in all cases in which the undertakers are authorised to take away and cut off the supply of gas from any premises, the undertakers, their agents or workmen, may, after giving certain notice, enter such premises, between the hours of nine in the morning and four in the evening, for the purpose of removing and to remove the pipes, meters, fittings, or apparatus, repairing all damage caused by such entry or removal (*e*). The notice required is a twenty-four hours' notice in writing under the hand of the secretary or other properly authorised officer of the undertakers to the occupier, or, if the premises are unoccupied, then to the owner or lessee, or to the agent of the owner or lessee, of any premises in which any pipes, meters, fittings, or apparatus belonging to the undertakers are laid or fixed, and through or in which the supply of gas is from any such cause discontinued (*e*).

company to recover the arrears from the new tenant who carries on the business, but only that they may make the payment of the arrears a condition of supplying the new tenant with gas (*Cannon Brewery Co.* v. *Gas Light and Coke Co.*, [1904] A. C. 331, approving *Gas Light and Coke Co.* v. *Mead* (1876), 45 L. J. (M. C.) 71).

(*b*) *Re Smith, Ex parte Mason*, [1893] 1 Q. B. 323 (a case in which a receiving order was made against the debtor, and the undertakers were held entitled to refuse to continue the supply unless the arrears were paid); *Paterson* v. *Gas Light and Coke Co.*, [1896] 2 Ch. 476, C. A.; *Husey* v. *Gas Light and Coke Co.* (1902), 18 T. L. R. 299 (cases where a receiver-manager for debenture-holders was appointed). A trustee in bankruptcy who takes possession of the premises is an incoming tenant (see *Re Flack, Ex parte Berry*, [1900] 2 Q. B. 32, a case decided under a similar provision in a water Act).

(*c*) Model Gas Bill, 1910, clauses 31, 33.

(*d*) *Ibid.*, clause 31. The clause also requires that notice of this provision shall be indorsed upon every demand note for gas charges payable to the company.

(*e*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 22. In the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 17, it is provided that in all cases in which the undertakers are authorised to cut off and take away the supply of gas from any house or building or premises under the provisions of this or the special Act, the undertakers, their agents or workmen, after giving twenty-four hours' previous notice to the occupier, may enter into any such house, building,

SECT. 3. Supply to Public Lamps.

SECT. 3.—*Supply to Public Lamps.*

Duty to supply gas.

682. Undertakers must by the Gasworks Clauses Act, 1871, supply gas to any public lamps within the distance of fifty yards from any of the mains of the undertakers, in such quantities as any road authority within the limits of the special Act may require to be supplied (*f*). The price to be charged by the undertakers and to be paid to them for all gas so supplied is to be settled by agreement between the local authorities and the undertakers, and in case of difference by arbitration, regard being had to the circumstances of the case and the prices charged to private consumers in the district (*g*). If the undertakers neglect or refuse to supply gas to all or any of the public lamps in accordance with these provisions, they become liable to a penalty not exceeding 40*s.* for each default (*h*).

Consumption by meter.

683. The gas supplied to the public lamps within the limits of the special Act is to be consumed by meter at the option either of the local authority of the district or of the undertakers. If it is so consumed, the meter must be provided and fixed by the undertakers and paid for by the party requiring it (*i*). If the gas

or premises, between the hours of nine in the forenoon and four in the afternoon, and remove and carry away any pipe, meter, fittings, or other works the property of the undertakers. This provision was repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), except so far as incorporated in special Acts to which the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), does not apply. As to such application, see p. 317, *ante*.

(*f*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 24. The words of the Act are "as the local authority of each district or the trustees of any turnpike road or any highway board," etc. As to the bodies exercising the powers of road authorities, see title HIGHWAYS, STREETS, AND BRIDGES; see also p. 313, *ante*. Ss. 24—27 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), are placed in the statute under a heading entitled "Supply of Gas to Local Authorities," but, with the possible exception of s. 27, they relate solely to the supply to public lamps. Similar provisions exist in the special Acts of the metropolitan companies. For forms of agreement for supply to a public authority, see Encyclopædia of Forms and Precedents, Vol. XV., pp. 262, 269.

(*g*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 24. In the latter part of the section the expression "local authorities" alone is used, and no reference is made to turnpike trustees or highway boards. The arbitration would appear to be in manner provided by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); see Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 27. It is common in special Acts to provide that the price shall not exceed the lowest price charged to private consumers. In a case where a clause in a special Act fixed the price at a certain sum per lamp, it was held that the gas company were entitled to recover the full sum although during certain months of a year some of the lamps had not been supplied with gas in consequence of exceptional frost (*Re Richmond Gas Co. and Richmond (Surrey) Corporation*, [1893] 1 Q. B. 56). The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 119, 120, authorises the commissioners to contract for the prescribed period, or any period not exceeding three years if none is prescribed, for the supply of gas to public lamps, and disputes as to price are to be settled by arbitration in manner provided in the Lands Clauses Acts; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 73 *et seq.* As to contracts for gas supply under the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), see p. 308, *ante;* and under the Public Health Act, 1875 (38 & 39 Vict. c. 55), see p. 309, *ante*.

(*h*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36. As to recovery of penalties, see pp. 373 *et seq.*, *post*.

(*i*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 25.

SECT. 3. Supply to Public Lamps.

is supplied to the public lamps in any district by average meter indication, the undertakers are required, in order to secure uniformity of consumption between metered and unmetered lamps, from time to time to provide the public lamps in such district with proper self-acting pressure regulators and burners to the satisfaction of the local authority of such district; and the average amount of the indications of all the meters attached to the public lamps within such district under the control of the local authority shall, except as hereinafter mentioned, be deemed to be the amount consumed by each such lamp in such district (*j*).

Governors for street lamps.

684. Either the undertakers or the local authority of the district may, at their own expense, cause to be affixed to each public lamp supplied with gas the instrument known as a street lamp governor, and the undertakers or such local authority (as the case requires) are entitled to have access thereto for the purpose of examining the same (*k*).

Settlement of differences.

685. Any difference which may arise between the undertakers and any local authority in relation to the supply or consumption of gas to or by the local authority is required from time to time to be settled by arbitration in manner provided by statute (*l*) with respect to the settlement of disputes by arbitration (*m*).

SECT. 4.—*Special Powers of Supply.*

Supply for special purposes.

686. In addition to the powers and restrictions as to supply contained in special Acts, gas companies and other corporations, bodies, and persons having the management of any gasworks may, in their discretion, grant and furnish supplies of gas for certain public baths and washhouses and open bathing places, and also for certain lodging-houses for the working classes, either without charge or on such favourable terms as they shall think fit (*n*).

SECT. 5.—*Measures used in Sale of Gas.*

SUB-SECT. 1.—*Board of Trade and Local Standards.*

Sale of Gas Act, 1859.

687. The measures used for the sale of gas are regulated by the Sale of Gas Act, 1859 (*o*), as amended by subsequent statutes (*p*).

(*j*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 25.

(*k*) *Ibid.*, s. 26.

(*l*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 128—134; and see title COMPANIES, Vol. V., pp. 726, 727.

(*m*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 27.

(*n*) As to baths and washhouses, see the Baths and Wash-houses Act, 1846 (9 & 10 Vict. c. 74), s. 28; as to lodging-houses, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 69; and as to both, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. In some special Acts the undertakers have been required to supply gas gratuitously to hospitals and buildings maintained at the expense of the rates; see *Oldham Union Guardians* v. *Oldham Corporation* (1854), 2 W. R. 590.

(*o*) 22 & 23 Vict. c. 66.

(*p*) These amending statutes so far as England and Wales are concerned are the Sale of Gas Act, 1860 (23 & 24 Vict. c. 146); Metropolis Gas Act, 1861 (24 & 25 Vict. c. 79); Standards of Weights, Measures and Coinage Act, 1866 (29 & 30 Vict. c. 82), s. 14 (now repealed); Weights and Measures Act, 1878 (41 & 42 Vict.

SECT. 5. Measures used in Sale of Gas.

That Act was partially adoptive, and did not come into operation in any county until it was so resolved by the authority to administer it in the county, and if there is any county where it is not yet in operation a resolution of the county council to that effect will be required to bring such county under the operation of the Act (*q*).

Authorities administering Act.

688. The central authority to administer the Act is the Board of Trade (*r*). The local authority to administer the Act in counties is the county council (*s*), who also administer it in boroughs with or without a separate court of quarter sessions, which contained according to the census of 1881 a population of less than 10,000, as if such boroughs were part of the county (*t*). In London the London County Council is the administrative local authority (*a*). In county boroughs and in boroughs other than those above referred to, the Act is administered by the borough council where they have adopted it, unless the council is a manufacturer or seller of gas, in which case the borough justices carry it into effect (*b*).

Cubic foot.

689. The only legal standard or unit of measure for the sale of gas by meter is defined as the cubic foot containing 62·321 lbs. avoirdupois weight of distilled or rain water weighed in air at a temperature of 62° Fahr., the barometer being at 30 inches (*c*). The Sale of Gas Act, 1859, provided that, within three months of its passing, models of gasholders measuring the said cubic foot, and such multiples and decimal parts of the said cubic foot as the

Standard models.

c. 49); Local Government Act, 1888 (51 & 52 Vict. c. 41); Weights and Measures Act, 1889 (52 & 53 Vict. c. 21); and certain of the Statute Law Revision Acts. Some of these latter Acts also repealed provisions of the amending Acts, which had repealed provisions of the Sale of Gas Act, 1859 (22 & 23 Vict. c. 66); but the repeal in such later Acts does not revive the enactments previously repealed (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (2)); and as to effect of such repeals generally, see title STATUTES. The Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), applies to Great Britain and Ireland.

(*q*) Sale of Gas Act, 1860 (23 & 24 Vict. c. 146), s. 1, proviso. This proviso was repealed as regards the metropolis by the Metropolis Gas Act, 1861 (24 & 25 Vict. c. 79), s. 2, which section was repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66). Boroughs could also within a limited time adopt the Act by resolution of the council, where the council was not a manufacturer or seller of gas, and where the council was such manufacturer or seller the justices of the borough had the like power to adopt and carry the Act into effect (Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 4). As to county councils being the authorities to administer the Act, see *supra*.

(*r*) The powers of the Treasury and of the Comptroller-General of the Exchequer have been transferred to the Board of Trade (Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 33); and see, generally, title WEIGHTS AND MEASURES.

(*s*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 4; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.). As to local authorities for other purposes, compare p. 313, *ante*, and for local authorities generally, see title LOCAL GOVERNMENT.

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 39 (1).

(*a*) Metropolis Gas Act, 1861 (24 & 25 Vict. c. 79), s. 1; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8).

(*b*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66); and as to county boroughs being excepted from the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), in respect of gas meters, see *ibid.*, s. 34 (3).

(*c*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 2. The term "meter" in

SECT. 5. Measures used in Sale of Gas.

Treasury should judge expedient, and, from time to time thereafter, models of such multiples and decimal parts of the said cubic foot as the Treasury should from time to time think expedient, should be carefully made, with proper balances, indices, and apparatus for testing the measurement and registration of meters, and that such models should be verified under the direction of the Treasury, and when so made and verified should be deposited in the office of the Comptroller-General of the Exchequer at Westminster (*d*). These models were made and deposited, and subsequently transferred to the Board of Trade, who were given charge thereof, and all the powers and duties in connection with the standards were transferred to them, and the validity of the models so deposited remained unaffected (*e*). Copies of models so from time to time deposited and verified under the direction of the Board of Trade must be sent to the Lord Mayor of London and the chief magistrates of Edinburgh and Dublin, and to the chief magistrates of such other cities and boroughs, and to such other places and persons in His Majesty's dominions as the Board of Trade may from time to time direct. The Board of Trade must also appoint a competent person or persons to design and make, subject to the Board's approval and direction, stamps of a uniform design to be used for stamping meters throughout the United Kingdom, with only such variations of numbers and marks thereon as shall be sufficient to distinguish each inspector's district (*f*).

Copies of models.

690. The authorities to administer the Act locally (*g*) are to determine the number of copies of the said models of gasholders, with proper balances, indices, and apparatus as aforesaid requisite for the testing of meters within their respective jurisdictions (*h*), and must direct that such copies, verified and stamped by the central authority (*i*), together with such number of stamps for stamping

Local models.

the Act means gas meter, and includes every kind of machine for measuring gas.

(*d*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 3. This provision as to the making of models within three months was repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19). As to transfer of powers to Board of Trade, see note (*r*), p. 344, *ante*.

(*e*) Standards of Weights, Measures, and Coinage Act, 1866 (29 & 30 Vict. c. 82), which was repealed and, so far as necessary, re-enacted by the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 33. By s. 66 (*ibid.*) it was provided that nothing therein shall affect the validity of the models of gasholders verified and deposited in the Standards Department of the Board of Trade in pursuance of the Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), as amended, and the provisions of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), with respect to Board of Trade standards shall apply to such models, and the provisions of that Act with respect to defining the amount of error to be tolerated in local standards when verified or re-verified shall apply to defining the amount of error to be tolerated in such copies of the said models of gasholders as are provided by justices or councils in pursuance of the said Acts.

(*f*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66).

(*g*) See p. 344, *ante*.

(*h*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 4.

(*i*) They were required formerly to be stamped at the Exchequer; now at the Board of Trade. The time for first requiring the models was extended by the Sale of Gas Act, 1860 (23 & 24 Vict. c. 146), s. 1, but the time has long expired.

SECT. 5. **Measures used in Sale of Gas.**

Inspectors.

meters as they deem requisite, shall be provided for the use of the same, and must fix the places at which such copies and stamps shall be deposited (*j*). They must also appoint a sufficient number of inspectors of meters for the safe custody of such copies and for the discharge of the other duties mentioned in the Act, and allot to each inspector a separate district; and from time to time, when necessary, they must subdivide and re-allot such districts, and all the districts are to be distinguished by the number or mark applied thereto on such stamps (*j*). The authorities must also direct what reasonable remuneration is to be paid to the inspectors in respect of their duties under the Act, and they may suspend or dismiss any inspectors so appointed, or appoint additional inspectors as occasion may require (*j*).

Expenses of Act.

691. The copies of the models directed to be stamped and verified by the Board of Trade must be compared with the models there deposited, and if correct must be stamped by the Board of Trade, and no stamp duty is payable thereon (*k*). The expense of providing and transmitting the copies of models of gasholders, with the proper balances, indices, and apparatus, and of the stamp to be used by the inspectors and the remuneration to the inspectors, is paid in counties out of the county fund, and in boroughs out of any funds applicable to lighting purposes, and if there are no such funds, then out of the borough fund (*l*), in the County of London out of the rates leviable by the London County Council within their jurisdiction, exclusive of the City of London (*m*), and in the City out of the general rate (*n*). The verification and reverification of these standards used by local authorities in testing meters are regulated by the provisions in the Weights and Measures Acts, 1878—1904 (*o*), including those as to the amount of error to be tolerated in such copies (*p*).

Appointment of inspectors.

692. No person can be an inspector of meters who is a maker, repairer, or seller of meters or gas, or employed in the making, repairing, or selling of meters or gas (*q*). Every inspector on his appointment must forthwith enter into a bond of recognisance to the King, to be sued for in any court of record, in

(*j*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 4.

(*k*) *Ibid.*, s. 6. Fees for stamping and verifying were at one time payable, but the provision was repealed by the Standards of Weights, Measures and Coinage Act, 1866 (29 & 30 Vict. c. 82), s. 14.

(*l*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 7; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3.

(*m*) Metropolis Gas Act, 1861 (24 & 25 Vict. c. 79), s. 1; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8). As to the jurisdiction of the London County Council, see title METROPOLIS. As to rates in general, see title RATES AND RATING.

(*n*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 7; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.); City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.).

(*o*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 15. As to such verification, see more particularly the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 41, which enactment is also dealt with in title WEIGHTS AND MEASURES.

(*p*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 66.

(*q*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 8. As to fees, see p. 349, *post*.

SECT. 5. Measures used in Sale of Gas.

such sum, and either with or without a surety or sureties, as the authority or persons appointing shall fix, for the due and punctual performance of the duties of his office, and for the due and punctual payment at such time or times as he may be directed by the local authority or person appointing him of all fees received by him under the authority of the Sale of Gas Act, 1859, and amending Acts, and for the safety of the copies and models committed to his charge, and for their due restoration and surrender to such person or persons as may be appointed to receive them by the local authority or other person on his removal from office (*r*).

SUB-SECT. 2.—*Testing and Stamping Meters.*

Meters to be stamped.

693. All meters used for buying or selling gas, or for the collecting of any rates or duties, or for making any charges on the passage, transmission, or conveyance of gas, must be examined and tested, and, if found correct, stamped, and every person who knowingly uses any meter which has not been so stamped is liable on conviction to forfeit a sum not exceeding £5, and any contract, bargain, or sale by any such unstamped meter is void. Any unstamped meter so used, on being discovered by any inspector, must be seized, and, on the conviction of the person knowingly using or possessing the same, must be forfeited and destroyed (*s*).

Fixing unstamped meters.

No meter for the purpose of ascertaining the quantity of gas sold may be fixed for use unless the same shall have its measuring capacity at one revolution or complete action of the meter, and also the quantity per hour it is intended to measure in cubic feet or multiples, or decimal parts of a cubic foot, denominated or marked on the outside thereof in legible letters or figures. It must also be stamped by an inspector of meters, and every person who fixes for use any such meter before it has been so stamped is liable to a penalty of £5 for every such unstamped meter, and all meters required to be tested and stamped are required to be delivered to the inspector at the place where his testing gasholder and apparatus are kept (*t*).

Power of entry to inspect meters.

Any inspector authorised in writing under the hand of any justice of the peace at the request and expense of any buyer or seller of gas, who shall have given twenty-four hours' notice (*u*) in writing to the other party to the contract, may, at all reasonable times,

(*r*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 8.

(*s*) *Ibid.*, s. 17. A period of ten years from the passing of the Act was allowed for the stamping of meters then in use.

(*t*) *Ibid.*, s. 18. A short period was limited for this provision to come into operation, and purchasers and sellers of gas were empowered to have the meters in use tested and stamped or to substitute stamped meters for them (*ibid.*, and Sale of Gas Act, 1860 (23 & 24 Vict. c. 146), s. 1). Consumers of gas may purchase and use for the measurement of gas supplied to them any meter duly stamped, provided that the gas to be consumed per hour does not exceed the quantity per hour the meter is intended to measure, as marked on the outside thereof (Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 16).

(*u*) If the head office of the person or company to whom such notice is to be given is more than twenty miles distant from the meter referred to in the notice,

SECT. 5. Measures used in Sale of Gas.

enter any house or shop, store, warehouse, still, yard, or place whatsoever within his jurisdiction where any meter, whether stamped or unstamped, shall be fixed or used, and may examine and test the same, and, if necessary for such purpose, may remove the meter, doing as little damage thereby as may be. If upon such examination and testing it appears that the meter is incorrect or fraudulent, it must not be refixed or used again unless and until altered and repaired, so as to measure and register correctly, and stamped. The fees on such removal, examination, and testing of a meter, whether stamped and replaced or not, are to be double the usual fees for testing and stamping, and are to be payable by the buyer or seller of gas as the justice of the peace shall determine, and shall be recoverable accordingly (*a*).

Attendance of inspectors with testing apparatus.

694. The authority or persons appointing the inspectors are required to determine and appoint the days, hours, and places at which each inspector shall attend, with the copies of models and stamps in his custody, at each of the several towns and districts within their respective jurisdictions, as they shall deem expedient. Every inspector so attending must examine, test, and, if found correct, stamp all meters which are required to be so examined, tested, and stamped, and he must deface or destroy the stamp on any meter tested and found incorrect. He must also keep a book wherein he must enter minutes of all such examinations and testings, with the numbers of identity and capacity marked by the manufacturer on such meters, and give, if required, a certificate under his hand of every such stamping and defacing. He must also once in every quarter of a year account to the treasurer of the county, riding, division, city, or borough, or to such other person as shall be duly authorised by those who may have appointed him, for all fees received by him under the Act, and pay the amount thereof to such treasurer, who must account for the same (*b*). A meter once stamped is a legal meter throughout the United Kingdom, and is not liable to be restamped unless found to be incorrect (*c*).

Testing for leakage.

695. The rules to be observed by the inspector in testing meters are as follows:—The meter must be tested for soundness or leakage only, and not for percentage of error, when fixed on a horizontal base and with gas under a pressure equal to a column of water three inches high, with a light or lights consuming not more than one twentieth part of its measuring capacity per hour marked thereon, nor less than one half of a cubic foot per hour for all

then a three days' notice in writing is required to be given instead of a twenty-four hours' notice (Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 20).

(*a*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 20. There is a proviso to that section that any person duly authorised by any company or persons selling gas by meter may supply water to any meter so as to keep the water at the correct level. As to orders of justices generally, see title MAGISTRATES.

(*b*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 9.

(*c*) *Ibid.*, s. 10.

meters of a measuring capacity not exceeding 100 cubic feet per hour, and not more than one fortieth part of its said measuring capacity per hour for all meters of any greater measuring capacity per hour than 100 cubic feet; and all meters found to work under such test shall be deemed sound meters, and any meter found not to work thereunder shall not be stamped.

Testing for error.

696. The meter to be tested for percentage of error must be fixed on a horizontal base, and be tested at a pressure equal to a column of water five-tenths of an inch high, and passing the quantity of gas or atmospheric air per hour which shall be marked thereon as its measuring capacity per hour; and the water used in this testing and the air of the room in which such testing is made must be as nearly as practicable of the same temperature as the gas or air passed through the meter (*d*).

Allowable error.

697. No meter may be stamped which is found by the inspector to register, or to be capable of being made by any contrivance for that purpose, or by increase or by decrease of the water in such meter, or by any other means practically prevented in good meters, to register, quantities varying from the true standard measure of gas more than 2 per cent. in favour of the seller or 3 per cent. in favour of the consumer. Every meter, whether stamped or unstamped, found by the inspector to register, or to be capable of being made to register, quantities varying beyond these limits, is to be deemed incorrect, and every meter found to measure and register quantities accurately, or not varying beyond these limits, and also found incapable by any such means of being made to register quantities varying beyond these limits, is to be considered to be correct and stamped in such manner and on such part of the meter as shall be specially directed by the authority appointing the inspector, or in default of direction, as shall in his opinion best prevent fraud (*e*).

Fees for testing and stamping.

698. The fees for examination, comparison, and testing meters, with or without stamping, are 6*d.* for each meter delivering a cubic foot of gas in four or more revolutions or complete repetitions of the action of the meter, and 1*s.* for each meter delivering a cubic foot of gas by any less number of revolutions or complete actions, or by one revolution or complete action, and for each meter delivering more than one cubic foot of gas by one revolution or complete action the further sum of 1*s.* for every cubic foot of gas beyond the first delivered at one revolution or complete action (*f*).

(*d*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 13.

(*e*) *Ibid.*, s. 12. There is a proviso to this section that every meter having a measuring capacity at one revolution or complete action of the meter of not less than five cubic feet, and having permanently marked upon it in some conspicuous place the words "without float," shall be stamped by the inspectors if found correct in all other respects except that it is capable of being made by abstraction of water to register incorrectly against the seller of gas; but it shall not be lawful to use in the sale of gas any such meter, when so stamped by the inspector, except by written agreement between the buyer and seller specifying that this description of meter shall be used.

(*f*) *Ibid.*, s. 19.

SECT. 5. **Measures used in Sale of Gas.**

Penalty on inspector for misconduct.

699. An inspector is liable on conviction to a penalty not exceeding £5 for each offence if he stamp any meter without duly testing and finding the same to be correct, or if he refuse or for three days after being so required neglect without lawful excuse to test any meter, or to stamp any meter found to be correct on being so tested, or if he be guilty of any breach of duty imposed upon him (*g*).

Penalty for counterfeiting stamps.

Every person is liable on conviction to penalties, not exceeding £50 nor less than £10 for each offence, who unlawfully makes, or forges or counterfeits, or causes or procures to be unlawfully made, or forged or counterfeited, or knowingly acts or assists in the unlawful making, or forging or counterfeiting, any stamp or mark which may be used for the stamping or marking of any meter (*h*). If any person knowingly sells, utters, or disposes of, lets, lends, or exposes to sale any meter with such forged stamp or mark thereon, he is liable on conviction to a penalty not exceeding £10 nor less than 40*s.* for each offence; and all meters with such forged or counterfeited stamps must be forfeited and destroyed (*h*).

Penalty for tampering with meter or obstructing inspector.

700. Any person who knowingly repairs or alters, or knowingly causes to be repaired or altered, or knowingly tampers with or does any other act in relation to any stamped meter, so as to cause such meter to register unjustly or fraudulently, or who prevents or refuses to allow lawful access to any meter in his possession or control, or the supply of water thereto, so as to keep the water at the correct level, or obstructs or hinders any authorised examination or testing, is liable on conviction to a penalty not exceeding £5, and to pay the fees for removing and testing and the expense of purchasing and fixing a new meter. The payment of any such penalty does not exempt the person paying from liability to indictment or other proceeding at law to which he would otherwise be liable, nor deprive any person of the right to recover damages against the offender for any loss or injury sustained by such act or default (*i*).

Application of fees and penalties.

701. All fees and penalties received and recovered are to be applied in aid of the fund out of which the expenses are to be defrayed (*k*).

Disputed decision of inspector.

702. In case of any dispute between the buyer and seller of gas by meter, or between any owner of a meter and any inspector of meters respecting the correctness of any meter, the inspector must, if required by any such person dissatisfied with his decision, give that person in writing his reasons for such decision, and such party may require the meter to be examined and re-tested by two inspectors of adjoining or neighbouring districts to be named by any justice of the peace having jurisdiction in the district where the meter shall have been tested. The unanimous decision of

(*g*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 11.
(*h*) *Ibid.*, s. 14.
(*i*) *Ibid.*, s. 15. As to supplying water to meters, see *ibid.*, s. 20, and note (*a*), p. 348, *ante*.
(*k*) *Ibid.*, s. 25. As to how the expenses are defrayed, see p. 346, *ante*.

any such last-mentioned inspectors is final as to the correctness or incorrectness of the meter except in case of appeal to general or quarter sessions, but if the two inspectors do not agree, the decision of the inspector of the district to which such meter belongs is to be considered final except in case of such appeal. The expenses of these proceedings are to be determined by the justice, who is also to determine by and to whom they are to be paid, and they may be recovered in any court of competent jurisdiction (*l*).

Appeals.

703. All persons who may think themselves aggrieved by any act or decision of any inspector or inspectors of meters, or by any order, judgment, or determination of any justice of the peace relating to any matter or thing mentioned or contained in the Sale of Gas Act, 1859, may appeal to the then next practicable general or quarter sessions, and that court may, if it sees cause, reverse or alter such decision and mitigate any penalty or forfeiture (*m*).

SECT. 6.—*Testing the Quality and Pressure of Gas.*

Testing.

704. In order that the gas supplied may be maintained at the standard of quality and purity prescribed by the special Act (*n*), the undertakers must provide at the place prescribed in the special Act, and within the time in such Act prescribed, a testing place with apparatus therein, for the purposes of testing (1) the illuminating power of the gas supplied, and (2) the presence of sulphuretted hydrogen in the gas supplied, or such of these purposes as may be prescribed by the special Act (*o*). The apparatus must either be in accordance with the regulations prescribed by statute (*p*) or according

(*l*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), s. 21. As to jurisdiction of justices generally, see title MAGISTRATES.

(*m*) Sale of Gas Act, 1859 (22 & 23 Vict. c. 61), s. 22. The parts of this section relating to procedure on appeal were repealed as regards England by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43). As to appeals to quarter sessions generally, see title MAGISTRATES.

(*n*) As to these standards, see p. 334, *ante*.

(*o*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 28. The testing place is usually required to be on the lands of the undertakers as described in the schedule, and to be provided before or within three months of the commencement of supply of gas (Model Gas Bill, 1910, clause 24). In the metropolis there are special provisions relating to the testing of gas; see pp. 387 *et seq.*, *post*.

(*p*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), Sched. A, Part I. The regulations are as follows:—The apparatus for testing the illuminating power of the gas shall consist of the improved form of Bunsen's photometer, known as Letheby's open 60-inch photometer, or Evans' inclosed 100-inch photometer, together with a proper meter, minute clock, governor, pressure-gauge, and balance. The burner to be used for testing the gas shall be such as shall be prescribed in the special Act. The candles used for testing the gas shall be sperm candles of six to the pound, and two candles shall be used together. The apparatus for testing the presence in the gas of sulphuretted hydrogen shall consist of a glass vessel containing a strip of bibulous paper moistened with a solution of acetate of lead containing 60 grains of crystallised acetate of lead dissolved in one fluid ounce of water. In the Model Gas Bill the burner prescribed is that known as the Metropolitan Argand No. 2, the photometer is the bar photometer or the table photometer, the standard light that supplied by Harcourt's 10-candle pentane lamp, and power is reserved to the Board of Trade on the application of certain persons to approve the use of any other burner, photometer, or standard light which may appear to the Board to be equally or

SECT. 6. Testing the Quality and Pressure of Gas.

to such rules as may from time to time be substituted in lieu thereof by any special Act. It must be so situated and arranged as to be used for the purpose of testing the illuminating power and purity of the gas supplied by the undertakers, and they are required at all times thereafter to keep and maintain such testing place and apparatus in good repair and working order (*q*).

Appointment of gas examiner.

705. A gas examiner to test the gas at the testing place may be appointed from time to time after the passing of the special Act, or may be appointed and kept appointed by the local authority of any district within the limits of the special Act, where the gas is not supplied by the local authority (*r*). Where no such gas examiner is appointed, or where the testing of the gas is imperfectly attended to by the local authority, two justices, on the application of not less than five consumers of the gas of the undertakers, may by order in writing appoint a gas examiner (*s*). In either case he must be a competent and impartial person (*t*).

Time of testing.

706. The examiner appointed by the local authority may, at the testing place provided, test the illuminating power and purity of the gas supplied by the undertakers on any or every day between the hours of 5 p.m. and 10 p.m. from the 1st October to the 31st March, both inclusive, and on any and every day between the hours of 8 p.m. and 11 p.m. from the 1st April to the 30th September, both inclusive (*u*). The examiner appointed by justices may at any time within these hours, on producing the order appointing him, enter the premises of the undertakers and there test the illuminating power and purity of the gas supplied by them (*a*).

Access to testing place.

707. The undertakers are required to give to the gas examiner and to his assistants, and to every local authority within the limits of the special Act and their agents, access to the testing place, and to afford all facilities for the proper execution of the Act. For every default in so doing they become liable to a penalty not

more suitable for the testing (see clause 25 in Model Gas Bill, 1910). Where the special Act prescribes a general form of burner, the company are entitled to have the gas tested by the most improved form of burner that complies with the description in the Act (*Brentford Gas Co.* v. *Chiswick Urban District Council* (1908), 72 J. P. 378).

(*q*) See note (*p*), p. 351, *ante*.

(*r*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 29.

(*s*) *Ibid.*, s. 30. As to the costs of the examiner and of the proceedings, see *ibid.*, s. 37, and p. 354, *post*. As to orders of justices generally, see title MAGISTRATES.

(*t*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), ss. 29, 30.

(*u*) *Ibid.*, s. 29. In a case where the examiner was authorised by the special Act to test the gas "daily," it was held that he was entitled to test it on Sundays, although such had not been the practice for years (*London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A., in which case it was also held that the local authority had under the special Act sufficient interest to bring an action to restrain the undertakers from interfering with their examiners without making the Attorney-General a party to the proceedings). As to the meaning of such terms as "daily," see title TIME.

(*a*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), ss. 29, 30.

exceeding £5 to the local authority or to the persons making the application (*b*).

Mode of testing.

708. The tests are to be taken in accordance with certain prescribed rules (*c*), and the undertakers may, if they think fit, on each occasion of the testing of the gas by the examiner, be represented by some officer, but such officer must not interfere with the testing (*d*).

Report of examiner.

709. The examiner is required, on the day immediately following that on which the testing of the illuminating power or purity of the gas has been conducted, to make and deliver a report of the results of his testing to the local authority or justices by whom he was appointed and to the undertakers, and such report shall be receivable in evidence (*e*).

Testing pressure.

710. There are no provisions in the Gasworks Clauses Acts prescribing the pressure at which the gas is to be supplied, but such provision is commonly found in special Acts, the pressure being described as that which will balance a column of water of a certain height at the main, or as near as may be to the junction therewith of the service pipe supplying the consumer. There is also a provision authorising any gas examiner at the testing place or at any public lamp, as and when he thinks fit, to test the pressure at which the gas is supplied, and the undertakers are required to offer him reasonable facilities for so doing (*f*).

(*b*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 34. As to recovery of penalties, see pp. 373 *et seq.*, *post*.

(*c*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), Sched. A, Part II. The rules as to the mode of testing gas for illuminating power are as follows:—The gas in the photometer is to be lighted at least fifteen minutes before the testings begin, and it is to be kept continuously burning from the beginning to the end of the tests. Each testing is to include ten observations of the photometer made at intervals of a minute. The consumption of the gas is to be carefully adjusted to five cubic feet per hour. The candles are to be lighted at least ten minutes before beginning each testing, so as to arrive at their normal rate of burning, which is shown when the wick is slightly bent and the tip glowing. The standard rate of consumption for the candles shall be 120 grains each per hour. Before and after making each set of ten observations of the photometer, the gas examiner is required to weigh the candles, and if the combustion shall have been more or less per candle than 120 grains per hour, he must make and record the calculations requisite to neutralise the effects of this difference. The average of each set of ten observations is to be taken as representing the illuminating power of that testing.

The rule as to testing gas for sulphuretted hydrogen is as follows:—The gas shall be passed through the glass vessel containing a strip of bibulous paper moistened with the solution of acetate of lead for a period of three minutes or such longer period as may be prescribed; and if any discoloration of the test paper is found to have taken place, this is to be held conclusive as to the presence of sulphuretted hydrogen in the gas.

In testing for illuminating power, corrections ought to be made for variations in temperature and barometrical pressure in order to get accurate results. Such corrections are not prescribed in the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), but provisions in respect thereof are to be found in the special Acts of the Metropolitan gas companies.

(*d*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 31.

(*e*) *Ibid.*, s. 33.

(*f*) Model Gas Bill, 1910, clause 26. The height of the column of water therein mentioned is $\frac{8}{10}$ of 1 inch.

SECT. 6. Testing the Quality and Pressure of Gas.

Penalties.

Costs.

711. If it shall be proved to the satisfaction of any two justices not being shareholders in the undertaking (*g*), after hearing the parties, that on any day the gas supplied by the undertakers is under less pressure, of less illuminating power, or of less purity than it ought to be, the undertakers shall in every such case forfeit and pay to the local authority or other persons making application for testing the gas such sum, not exceeding £20, as the justices shall determine (*h*). Where the examiner is appointed by the justices, the costs of and attending such experiment, including the remuneration to be paid to the persons making the same, and the costs of the proceedings before the justices, are to be ascertained by the justices, and in the event of a penalty being imposed on the undertakers, these costs, together with the penalty, are to be paid by the undertakers, but if no penalty is imposed the costs are in the discretion of the justices (*i*). It is also provided that whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises under such pressure as is prescribed they shall be liable to a daily penalty not exceeding 40*s.* during the continuance of such default (*k*).

Saving clause.

712. Special Acts commonly contain a clause which provides that the undertakers shall not incur these penalties when the insufficiency of pressure, defect of illuminating power, or excess of impurity in the gas supplied, is proved to have been produced by any circumstance beyond the control of the undertakers, but insufficiency of funds is not to be deemed such a circumstance (*l*).

Part IV.—Protection of the Property of Undertakers.

SECT. 1.—*Waste of Gas and Injury to Pipes.*

In general.

713. There are certain statutory provisions affording special protection to the property of undertakers in addition to that conferred by the general law (*m*). These provisions do not oust the remedies which the undertakers would, apart from them, have had at common law (*n*).

(*g*) A justice is not disqualified from acting by reason of his being liable to pay gas rent or other charge under the Act (Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 46).

(*h*) *Ibid.*, s. 36.

(*i*) *Ibid.*, s. 37. As to costs and procedure to recover penalties, see *ibid.*, ss. 42—46, and pp. 373 *et seq.*, *post*.

(*k*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36; and see, as to the effect of this, p. 333, *ante*.

(*l*) See Model Gas Bill, 1910, clause 27.

(*m*) Thus gas is the subject of larceny at common law, and a person may be indicted for fraudulently appropriating it before it has passed through the meter (*R.* v. *White* (1853), 22 L. J. (M. C.) 123, C. C. R.; *R.* v. *Firth* (1869), L. R. 1 C. C. R. 172); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 643.

(*n*) Thus, the common law remedy of recovering damages for injury to property is not ousted by reason of a summary remedy being provided by the special Act

SECT. 1. Waste of Gas and Injury to Pipes.

Offences in regard to gas.

714. Every person who does any of the following acts commits an offence (*o*)—namely, (1) who lays or causes to be laid any pipe to communicate with any pipe belonging to the undertakers without their consent, and it is no defence to prove that this was done without fraud, waste, or misuse of the gas (*p*); (2) who fraudulently injures any meter for the supply of gas (*q*); (3) who, in case the amount of gas supplied by the undertakers is not ascertained by meter, uses any burner other than such as has been provided or approved by the undertakers, or of larger dimensions than the person has contracted to pay for, or keeps the lights burning for a longer time than he has contracted to pay for; (4) who otherwise improperly uses or burns such gas, or (5) who supplies any other person with any part of the gas supplied to him by the undertakers. The penalty is that the person convicted shall forfeit to the undertakers the sum of £5 for each offence, and also the sum of 40*s.* for every day such pipe shall so remain, or such works or burner shall be so used, or such excess be so committed or continued, or such supply furnished, and the undertakers may take off the gas from the house and premises of the person so offending, notwithstanding any contract which may have been previously entered into (*r*).

Wilful injuries or waste.

715. Every person who wilfully removes, destroys, or damages any pipe, pillar, post, plug, lamp, or other work of the undertakers for supplying gas, or who wilfully extinguishes any of the public lamps or lights, or wastes or improperly uses any of the gas supplied by the undertakers, is liable for each such offence to forfeit to the undertakers any sum not exceeding £5 in addition to the amount of damage done (*s*).

Accidental injuries.

716. Every person who carelessly or accidentally breaks, throws down, or damages any pipe, pillar, or lamp belonging to the undertakers, or under their control, is required to pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding £5, as a court of summary jurisdiction shall think

(*Crystal Palace Gas Co.* v. *Idris & Co.* (1900), 82 L. T. 200). As to recovering the price of gas alleged to be fraudulently taken, see *Birmingham and Staffordshire Gas Co.* v. *Ratcliff* (1871), L. R. 6 Exch. 224. As to the liability of owners of steam rollers for injury to gas pipes laid in roads, see *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.; *Driscoll* v. *Poplar Board of Works* (1897), 14 T. L. R. 99. An injunction may be obtained to restrain the using of steam rollers in such a way as to injure gas pipes (*Alliance and Dublin Consumers Gas Co.* v. *Dublin County Council*, [1901] 1 I. R. 492, C. A.).

(*o*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 18. This section and ss. 19 and 20 came under the heading "with respect to waste or misuse of the gas, or injury to the pipes or other works." These clauses should be read with the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 38 (see p. 356, *post*), when both are incorporated in the special Act.

(*p*) *Morrison Wood & Co.* v. *West Ham Gas Co.* (1885), 52 L. T. 817.

(*q*) For other offences as regards meters, see Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), ss. 14, 15, and pp. 347—350, *ante*. As to the recovery of penalties, see pp. 373 *et seq.*, *post*.

(*r*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 18.

(*s*) *Ibid.*, s. 19.

SECT. 1. Wast of Gas and Injury to Pipes.

reasonable (*t*). An employer is not liable under this provision for the acts of his servant (*a*); but if the servant has by reason of negligence caused the injury, damages for the injury caused may be recovered at common law from his employer (*b*).

Penalties under Gasworks Clauses Act, 1871.

717. An offence is committed by every person who wilfully, fraudulently, or by culpable negligence injures, or suffers to be injured, any pipes, meter, or fittings belonging to the undertakers, or who alters the index to any meter or prevents any meter from duly registering the quantity of gas supplied, or fraudulently abstracts, consumes, or uses gas of the undertakers. Such person is liable for every such offence to forfeit and pay to the undertakers a sum not exceeding £5, and the undertakers may, in addition thereto, recover the amount of any damage sustained by them. This liability is without prejudice to any other right or remedy for the protection of the undertakers or the punishment of the offender. Further, where any person has wilfully or fraudulently injured, or suffered to be injured, any pipes, meters, or fittings belonging to the undertakers, or has altered the index to any meter, or prevented any meter from duly registering the quantity of gas supplied, the undertakers may also, until the matter complained of has been remedied, but no longer, discontinue the supply of gas to the person so offending, notwithstanding any contract previously existing. The existence of artificial means for causing such alteration or prevention, or for abstracting, consuming, or using gas of undertakers when such meter is under the custody or control of the consumer, is *primâ facie* evidence that such alteration, prevention, abstraction, or consumption, as the case may be, has been fraudulently, knowingly, and wilfully caused by the consumer using such meter (*c*).

Anti-fluctuater on gas engines.

718. In modern Acts it has been provided that every consumer of gas supplied by the undertakers who uses a gas engine must, if required to do so by the undertakers, use an anti-fluctuater, and at all times, at his own expense, keep such anti-fluctuater in proper order, and if any consumer makes default in complying with this provision, the undertakers are to have access to and be at liberty to take off, remove, inspect, and replace any such anti-fluctuater at all reasonable times, which taking off, removal, testing, inspecting, and

(*t*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 20. The term "carelessly" is meant to imply a degree of want of care less than would be necessary to found an action for negligence (*Ashton* v. *Eccles Corporation* (1906), 71 J. P. 55, approving *Burgess* v. *Morris* (1897), 61 J. P. 553), decided under an almost identical provision in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 207, relating to public lamps, in which case it was held that the owners of the lamps could recover although there had been no evidence of negligence or want of care. There are like provisions as regards public lamps in the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 55, 56.

(*a*) *Harding* v. *Barker* (1888), 53 J. P. 308, also decided under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 207; and see next note.

(*b*) *Crystal Palace Gas Co.* v. *Idris & Co.* (1900), 82 L. T. 200.

(*c*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 38. In cases where that Act and the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 18—20, are both incorporated in the special Act, these sections must be construed together.

replacing is to be done at the expense of the undertakers if the anti-fluctuater be found in proper order, but otherwise at the expense of the consumer.

SECT. 2.—*Breaches of Contract of Service.*

Malicious breach of contract.

719. In order to prevent the inhabitants of a town or district from being deprived of their supply of gas, certain breaches of contract are made criminal offences (*d*). An offence is committed when a person employed by a municipal authority (*e*), or by any company or contractor upon whom is imposed by Act of Parliament the duty (*f*), or who have otherwise assumed the duty, of supplying any city, borough, town, or place, or any part thereof, with gas, wilfully and maliciously (*g*) breaks a contract of service with that authority or company or contractor, knowing, or having reasonable cause to believe, that the probable consequence of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part wholly, or to a great extent, of their supply of gas. Such person may be convicted by a court of summary jurisdiction or on indictment (*h*), and on conviction is liable either to pay a penalty not exceeding £20 or to be imprisoned for a term not exceeding three months, with or without hard labour (*i*).

Notice.

720. Every such municipal authority, company, or contractor is required to cause to be posted up, at the gasworks belonging to them, a printed copy of s. 4 of the Conspiracy and Protection of Property Act, 1875 (*j*), in some conspicuous place where the same may be conveniently read by the persons employed, and as often

(*d*) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 564, 565.

(*e*) "Municipal authority" means the London County Council, the Common Council of the City of London, the town council of any borough for the time being subject to the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), any persons invested by any local Act of Parliament with powers of improving, cleansing, lighting, or paving any town, and urban district councils (Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 14); and see title LOCAL GOVERNMENT.

(*f*) Any municipal authority or company or contractor who has obtained authority by or in pursuance of any general or local Act of Parliament to supply the streets of any city, borough, town, or place, or of any part thereof, with gas, is to be deemed a municipal authority or company or contractor upon whom is imposed by Act of Parliament the duty of supplying such city, borough, town, or place, or part thereof, with gas (Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 14). As to local authorities for other purposes, compare p. 313, *ante*.

(*g*) "Maliciously" is to be construed in the same manner as it is required by the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 58, to be construed in reference to any offence committed under such last-mentioned Act (Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 15).

(*h*) The accused, on appearing before a court of summary jurisdiction, may claim to be prosecuted on indictment (Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 9). If convicted by a court of summary jurisdiction, he may also appeal to a court of general or quarter sessions (*ibid.*, s. 12). As to these courts generally, see title MAGISTRATES.

(*i*) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 4. Breaches of contract of a like nature, likely to endanger human life, or cause serious bodily injury, or to expose valuable property to destruction or serious injury, are also made offences (*ibid.*, s. 5).

(*j*) 38 & 39 Vict. c. 86.

SECT. 2. Breaches of Contract of Service.

as such copy becomes defaced, obliterated, or destroyed, must cause it to be renewed with all reasonable despatch. If any of these persons make default in complying with these provisions in relation to such notice, they or he incur on summary conviction a penalty not exceeding £5 for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up is liable on summary conviction to a penalty not exceeding 40*s.* (*k*).

SECT. 3.—*Alterations of Works by other Undertakers.*

Alterations by other undertakers.

721. In carrying out street improvements, and in the construction of other works of a public nature, it frequently becomes necessary to alter the position of gas mains and pipes and other like works. The power to do this is often conferred by Parliament both in general and in local Acts. It is conferred upon urban authorities for the purposes of the Public Health Act, 1875 (*l*), upon metropolitan borough councils on lowering or raising or improving streets (*m*), and upon the Postmaster-General in connection with telegraphs (*n*). It is inserted in special Acts authorising railways (*o*), tramways (*p*), and electrical undertakings (*q*). In some cases the alteration of the pipes is required to be done by the gas undertakers (*r*), and in others it may be done by the undertakers of the other works on giving certain notices (*s*). When the power is conferred, provisions are also inserted protecting the gas undertakers from loss and expense occasioned by the alteration in the position of their pipes, mains, and works (*s*).

(*k*) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 4.

(*l*) 38 & 39 Vict. c. 55, s. 153; Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 61, 62; see title HIGHWAYS, STREETS, AND BRIDGES.

(*m*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 98; Metropolitan Paving Act, 1817 (Michael Angelo Taylor's Act) (57 Geo. 3, c. xxix.), s. 52; and see title HIGHWAYS, STREETS, AND BRIDGES.

(*n*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 6—8; Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 2; Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 7; and see title TELEGRAPHS AND TELEPHONES.

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 18—23; and see title RAILWAYS AND CANALS.

(*p*) Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 30, 32, 33; *Re Ilford Gas Co. and Ilford Urban District Council* (1903), 88 L. T. 236; and see title TRAMWAYS AND LIGHT RAILWAYS.

(*q*) Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), ss. 15, 17; Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Schedule, clauses 17, 18. In the latter clause provision is also made for the protection of gas pipes from electric lines; see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 581.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 153.

(*s*) See statutory provisions cited in notes (*o*), (*p*), and (*q*), *supra*. Persons who damage gas pipes in constructing new works may be liable if an explosion results (*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.). As to extra expense in laying new service pipes and repairing mains in consequence of a tramway, see *Re Bristol Gas Co. and Bristol Tramways and Carriage Co., Ltd.*, [1910] 1 K. B. 114, C. A.

Part V.—Nuisances from Gas.

SECT. 1.—*In General.*

SECT. 1. In General.

Liability at common law.

722. When Parliament authorises an undertaking to be carried on in a particular manner and in a particular place, the undertakers may, in the absence of special provision, be empowered to cause a nuisance in so doing, provided they are not guilty of negligence (*t*). In the case of gas undertakings, however, the Acts usually incorporated contain express provision to the contrary (*a*). In the Gasworks Clauses Act, 1871 (*b*), it is provided that nothing in that or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them (*b*). When that provision is incorporated it is no defence to proceedings to restrain the undertakers from committing a nuisance to show that the gas cannot be supplied of the prescribed purity without causing a nuisance (*c*). They are therefore liable in respect of nuisances caused by them whether public (*d*) or private (*e*), and whether caused by the construction of their works (*f*) or in the making and supplying of gas (*g*). They are also liable for injuries caused by gas explosions owing to the negligence of their servants (*h*). Absence of reasonable inspection of their mains and pipes in order to detect escapes of gas is evidence of negligence on their part (*i*).

(*t*) See, for example, *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; and compare *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; and see title NUISANCE.

(*a*) As to incorporation, see pp. 317—319, *ante*. The same provision is contained in the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90); see p. 362, *post*.

(*b*) 34 & 35 Vict. c. 41, s. 9. The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 29, is to the like effect, except that it is confined to legal proceedings for nuisances to which the undertakers may be liable in consequence of making or supplying gas. This distinction is only of importance in the few cases in which the Act of 1847 is alone incorporated; see p. 318, *ante*.

(*c*) *A.-G.* v. *Gaslight and Coke Co.* (1877), 7 Ch. D. 217.

(*d*) *Ibid.*; and see *R.* v. *Medley* (1834), 6 C. & P. 292; *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71.

(*e*) *Imperial Gas Light and Coke Co.* (*Directors etc.*) v. *Broadbent* (1859), 7 H. L. Cas. 600, and cases cited in notes (*f*) and (*g*), *infra*.

(*f*) *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A. (a case in which the defendant company were restrained from withdrawing support from adjoining land by the draining of running silt during the excavation of their own land for the purpose of erecting a gasometer). The erection of gasworks will not be restrained on the ground that it may cause a nuisance (*Haines* v. *Taylor* (1847), 2 Ph. 209; *Butt* v. *Imperial Gas Light and Coke Co.* (1866), 14 W. R. 508).

(*g*) *A.-G.* v. *Gaslight and Coke Co.*, *supra*; *Batcheller* v. *Tunbridge Wells Gas Co.* (1901), 65 J. P. 680.

(*h*) *Blenkiron* v. *Great Central Gas Consumers Co.* (1860), 3 L. T. 317; *Burrows* v. *March Gas and Coke Co.* (1872), L. R. 7 Exch. 96, Ex. Ch.; *Scott* v. *Manchester Corporation* (1857), 2 H. & N. 204, Ex. Ch. As to the duty to take precautions, see *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640, P. C. The undertakers will not be liable in respect of explosions of gas escaping from defective pipes belonging to and supplied by the consumer (*Henderson* v. *Newcastle and Gateshead Gas Co.* (No. 1) (1893), 37 Sol. Jo. 403, C. A.); and see *Holden* v. *Liverpool New Gas Co.* (1846), 3 C. B. 1.

(*i*) *Mose* v. *Hastings and St. Leonards Gas Co.* (1864), 4 F. & F. 324; *Price* v. *South Metropolitan Gas Co.* (1895), 65 L. J. (Q. B.) 126.

SECT. 1. In General.

By general statute.

723. In addition to the general liability of undertakers at common law there are certain statutory provisions in public general Acts specially prohibiting gas undertakers from doing or allowing certain things which may cause certain nuisances to water (*k*), or the evolution of noxious fumes (*l*).

By special Act.

724. Special Acts authorising gasworks also contain express provisions against fouling water and other nuisances due to the escape of gas (*m*), and similar clauses in regard to fouling water are found in special Acts relating to waterworks (*n*) and to the conservancy of rivers (*o*). Persons supplying gas in rural districts under the Lighting and Watching Act, 1833 (*p*), and in the metropolis under the Metropolis Gas Act, 1860 (*q*), are subject to like provisions.

Notice of accidents.

725. Gasworks are within the statutory definitions of non-textile factories or workshops (*r*), and accordingly notice of accidents therein must be given in accordance with the statutory provisions relating to accidents in such places (*s*).

They are, however, subject to certain conditions, specially exempted from the statutory requirements as to limewashing (*t*).

SECT. 2.—*Under Gasworks Clauses Acts.*

Fouling of water in stream etc.

726. The Gasworks Clauses Act, 1847 (*u*), contains a series of clauses with respect to the provision for guarding against fouling water or other nuisance from the gas (*v*). Under these clauses the undertakers commit an offence if at any time they cause or suffer to be brought or to flow into any stream, reservoir, or aqueduct, pond, or place for water (*w*), or into any drain communicating

(*k*) Thus the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 68, contains provision against fouling streams by persons engaged in the manufacture of gas; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; and a similar provision is contained in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); see also Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 4, which does not, however, specifically refer to gasworks.

(*l*) Gas liquor works are within the provisions of the Alkali etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), Sched. I.; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) See *infra*.

(*n*) See Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 62—68; and title WATER SUPPLY.

(*o*) For example, Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), as amended by the Port of London Act, 1908 (8 Edw. 7, c. 68); Lee Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.).

(*p*) 3 & 4 Will. 4, c. 90; and see p. 362, *post*.

(*q*) 23 & 24 Vict. c. 125; see p. 382, *post*.

(*r*) See title FACTORIES AND SHOPS, Vol. XIV., pp. 437, 441; and compare *Owner* v. *Brighton and Hove Gas Co.* (1900), Journal of Gas, Lighting and Water Supply, 529, 586.

(*s*) Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 4; see title FACTORIES AND SHOPS, Vol. XIV., p. 472.

(*t*) *Ibid.*, note (*d*), p. 450.

(*u*) 10 & 11 Vict. c. 15.

(*v*) *Ibid.*, ss. 21—29. In the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), there are a series of clauses (*i.e.*, ss. 61—67) with respect to the provision against fouling the water of the undertakers, and of these ss. 62—67 are directed against the contamination of water by gas, and are similar to those in the Gasworks Clauses Act, 1847; see title WATER SUPPLY.

(*w*) A place for water would appear to include a well; see *Hipkins* v. *Birmingham and Staffordshire Gas Light Co.* (1860), 6 H. & N. 250, Ex. Ch.; compare

therewith (*a*), any washing or other substance produced in making or supplying gas, or if they wilfully do any act connected with the making or supplying of gas whereby the water in any such stream, reservoir, aqueduct, pond, or place for water shall be fouled (*b*). The penalty for every such offence is the sum of £200 (*c*), recoverable with full costs of suit in any of the superior courts by the person into whose water such washing or other substance is conveyed or flows, or whose water is fouled by any such act, but it is not recoverable unless sued for during the continuance of the offence, or within six months after it has ceased (*d*). In addition to the said penalty of £200, and whether such penalty is recovered or not, the undertakers are liable to a penalty of £20, to be recovered in like manner, for each day during which such washing or other substance is so brought or so flows, or the act by which such water is fouled continues, after the expiration of twenty-four hours from the time when notice of the offence is served on the undertakers by the person into whose water such washing or other substance is brought or flows, or whose water is fouled thereby, and the penalty is payable to such person (*e*).

Penalties.

727. Whenever any water within the limits of the special Act is fouled by the gas of the undertakers, they are liable to forfeit to the person whose water is so fouled for every such offence a sum not exceeding £20, and a further sum not exceeding £10 for each day during which the offence continues after the expiration of twenty-four hours from the service of notice of such offence (*f*).

Fouling of any water.

728. For the purpose of ascertaining whether such water is fouled by the gas of the undertakers, the person to whom the water supposed to be fouled belongs may dig up the ground and examine the pipes, conduits, and works of the undertakers. But before proceeding so to dig and examine he must give twenty-four hours' notice in writing to the undertakers of the time at which such digging and examination is intended to take place, and he must give the like notice to the persons having the control

Examination of pipes.

Millington v. *Griffiths* (1874), 30 L T. 65, decided under a corresponding provision in the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90); see p. 363, *post*.

(*a*) Compare *High Wycombe Corporation* v. *Thames Conservators* (1898), 78 L. T. 463 (a case under the provisions of a local Act).

(*b*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 21; see also *ibid.*, s. 25; and compare Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 62 (see title WATER SUPPLY), and Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 68, both to the like effect. It would seem that an offence is committed if gas washings flow into a place for water, although there has been no negligence on the part of the company (*Hipkins* v. *Birmingham and Staffordshire Gas Light Co.* (1860), 6 H. & N. 250, Ex. Ch., decided under a somewhat similar provision in a special Act).

(*c*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 21.

(*d*) *Ibid.*, s. 22.

(*e*) *Ibid.*, s. 23. The incorporation of these sections in a special Act repeals provisions of a like nature in an earlier Act (*Parry* v. *Croydon Commercial Gas and Coke Co.* (1863), 15 C. B. (N. S.) 568).

(*f*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 25. These penalties will be recoverable before a court of summary jurisdiction (*ibid.*, s. 40; and see p. 373, *post*).

SECT. 2. Under Gasworks Clauses Acts

of the road, pavement, or place where such digging is to take place; and they are subject to the like obligation of reinstating the said road and pavement, and the same penalties for delay or any nonfeasance or misfeasance therein, as are provided with respect to roads and pavements broken up by the undertakers for the purpose of laying their pipes (*g*). If upon such examination it appears that such water has been fouled by gas belonging to the undertakers, the expenses of the digging, examination, and repair of the street or place disturbed in such examination are to be paid by the undertakers; but if it appears that the water has not been so fouled, the person causing such examination to be made must pay all such expenses, and also make good to the undertakers any injury which may be occasioned to their works by such examination (*h*). These expenses and the sum for injury done are ascertained and recovered, with costs thereof, before a court of summary jurisdiction (*i*).

Expenses of examination.

Escape of gas.

729. Whenever any gas escapes from any pipe laid down or set up by or belonging to the undertakers, they must immediately after receiving notice thereof in writing prevent such gas from escaping. If they do not prevent the gas from escaping and wholly remove the cause of complaint within twenty-four hours after service of such notice, they are liable to forfeit for every such offence the sum of £5 for each day during which the gas shall be suffered to escape after the expiration of twenty-four hours from the service of such notice (*k*).

SECT. 3.—*Under Lighting and Watching Act.*

General liability.

730. Persons supplying gas under the Lighting and Watching Act, 1833 (*l*), are liable at common law for any nuisance, public or private, caused by them in so doing. The officers, servants, or workmen of the persons making, furnishing, or supplying the gas, whether for public or private use, may be proceeded against by indictment or otherwise for such nuisance, and nothing in the Act is to prevent actions being brought against the persons supplying the gas or against any of their officers, servants, or workmen for any injury sustained by reason of any of the works, or the use of the gas, or the method of lighting, whether such injury proceeds from the preparation or the use of the gas or method of lighting, or the carelessness or want of skill of any of the persons employed therein, or from any other cause whatsoever (*m*).

Escape of gas.

731. When gas is found to escape from any pipes laid down or set up by order of the body or persons administering the Act, the persons making or supplying gas for public or private lighting within

(*g*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 26. For provisions in regard to laying pipes, see *ibid.*, ss. 8—12, and pp. 325 *et seq.*, *ante*.

(*h*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 27; compare Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 64—67; and see title WATER SUPPLY.

(*i*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 28, 40. As to recovering these sums, see pp. 373 *et seq.*, *post*.

(*k*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 24. These penalties will also be recoverable before a court of summary jurisdiction (see *ibid.*, s. 40; and pp. 373 *et seq.*, *post*). As to courts of summary jurisdiction, see title MAGISTRATES.

(*l*) 3 & 4 Will. 4, c. 90.

(*m*) *Ibid.*, s. 54; compare Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 9; and see p. 359, *ante*.

the limits of the parish adopting the Act must, at their own expense, immediately after receiving notice by parol or in writing from any person, to be given or left at their office or usual place of business, of any such escape of gas, cause the most speedy and effectual measures to be taken to stop or prevent such gas from escaping. In case they fail to do so, and to wholly and satisfactorily remove the cause of complaint within twenty-four hours after such notice is given, they become liable for every such offence to a penalty not exceeding £5 for each day after the expiration of twenty-four hours from the time of giving such notice during which the gas shall be suffered to escape. The penalty is recoverable before a court of summary jurisdiction, with all reasonable charges, and is enforced by distress (*n*).

Gas washings.

732. No washings, waste liquids, or other matter or thing made or arising in the manufacture of the gas may be conducted or conveyed into any river, brook, canal, or running stream, and no pipe for conveying away such washings or waste liquids may be laid in any such situation where it may in any manner interfere with, prejudice, or affect any of the present or future public or private wells, sewers, or drains within the parish, or without the consent of the authority administering the Act (*o*). If the persons supplying the gas at any time empty, drain, or cause or suffer to be emptied, drained, or conveyed, or to run or flow, any such washings, waste liquids, substances, or things into any river, brook, stream, canal, aqueduct, waterway, feeder, pond, springhead, or well (*p*), or into any drain, sewer, or ditch communicating with any of them, or do or cause to be done any annoyance, act, or thing to the water contained in any of them, whereby such water may be fouled, they are liable to a penalty of £200 for every such offence. Such penalty is recoverable, with full costs of suit, in any of His Majesty's courts of law by regular or summary action or information, and is payable to the person or persons who shall inform or sue for the same, but is not recoverable unless sued for within six months from the time when the nuisance, damage, or act has ceased. In addition to the said penalty, and whether it shall have been sued for and recovered or not, the said persons are liable to a further penalty of £20 for each day such nuisance, damage, or act shall continue after twenty-four hours from notice in writing being given to them, or to their clerks or persons employed by them, by any person or persons to whom the said water, receptacle, drain, sewer, or ditch shall belong. This penalty is recoverable in a summary manner, and is payable to the informer or to the person or persons who, in the judgment of the court before whom the conviction takes place, shall have sustained any annoyance, injury, or damage by any such act (*q*).

(*n*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 48. As to courts of summary jurisdiction, see title MAGISTRATES.

(*o*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 49. As to the power to lay pipes to carry away gas washings, see pp. 326, 329, *ante*.

(*p*) This includes a well which has been disused for some years in consequence of the water being contaminated (*Millington* v. *Griffiths* (1874), 30 L. T. 65).

(*q*) Lighting and Watching Act, 1833 (3 & 4 Will. 4. c. 90), s. 50. The effect

SECT. 3. Under Lighting and Watching Act.

Contamination of water supply.

733. When the water of any company of proprietors supplying water to the parish adopting the Act, or part thereof, is contaminated by the gas, the persons supplying the gas are liable to a penalty of £20, to be sued for, recovered, and applied for the benefit of the company supplying the water. In case any such water is contaminated or affected by gas, the persons supplying the gas must, within twenty-four hours of receiving notice, cause the most proper and effectual measures to be taken to prevent gas escaping from their mains or works or from contaminating or affecting such water, and must wholly remove the cause of complaint. The notice must be in writing signed by the treasurer or other officer of the water company or by any person making use of such water, and must be left at the office or usual place of business of the persons supplying the gas. If the persons supplying the gas fail to act as aforesaid, they are liable on every such complaint to forfeit and pay to the treasurer or other officer for the time being of such water company, for the benefit of the company, in addition to the said penalty of £20, the sum of £10 for each day on which the water is contaminated or affected by the gas. In default of payment, such penalties may be recovered by information on the oath of one credible witness by and in the name of such treasurer or other officer, or by and in the name of one of the directors of the company, at the option of the parties prosecuting such information, before a court of summary jurisdiction, together with costs, to be levied by warrant of distress granted by such court. The penalty, when so levied, is to be paid to the treasurer or other officer of the water company for the use of the company (*r*).

Examination of pipes to discover escape.

734. In cases where upon such complaint it becomes a question whether water is contaminated or affected by the gas, the company of proprietors or other owners or proprietors of any waterworks, may dig to and about and search and examine the mains, pipes, conduits, and apparatus of the persons supplying the gas for the purpose of ascertaining whether such contamination is caused by such gas, and if it appears that the water has been so contaminated, the costs and expenses of the said digging, search, and examination, and of the repair of the pavement of the road or street taken up or disturbed, are to be borne and paid by the persons supplying the gas, such costs and expenses to be determined, if necessary, by a court of summary jurisdiction and recovered in the same manner as a penalty. If it appear that such contamination has not arisen from any such escape of gas, then these costs are to be borne by the owners of the waterworks, who must also make good to the persons supplying the gas any loss, injury, or damage caused to their pipes, mains, or apparatus by such search and examination, the amount to be determined by a court of summary jurisdiction (*s*).

of this section and subsequent sections only has been given in the text. Reference should be made to the statute, the wording of which is unnecessarily long. As to recovering penalties, see Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 63. As to enforcement of orders of courts of summary jurisdiction generally, see title MAGISTRATES.

(*r*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 52. As to laying gas pipes near water pipes, see *ibid.*, s. 51; and p. 330, *ante*.

(*s*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 53. As to these courts generally, see title MAGISTRATES.

Part VI.—Profits and Accounts.

SECT. 1.—*In General.*

SECT. 1. In General.

735. In the Gasworks Clauses Act, 1847 (*t*), there is a series of sections with respect to the amount of profit to be received by the undertakers when the gasworks are carried on for their benefit. The object of these clauses was to obtain for the consumers a reduction in the price of the gas after the undertakers had secured a fair profit. They were incorporated in the earlier legislation, and a clause was also inserted fixing the maximum price that could be charged for the gas (*u*). Experience showed that these clauses did not accomplish their object, and in more modern Acts, empowering existing companies to increase their capital, new provisions have almost invariably been introduced in substitution for and in addition to certain of those in the Gasworks Clauses Act, 1847 (*a*). These provisions have also been introduced in some Acts incorporating new companies. A sliding scale of charges, by which the dividend varies with the price charged, is frequently introduced along with these other provisions (*b*). Profits of companies.

736. In special Acts and provisional orders authorising local authorities to carry on gas undertakings these clauses or provisions are not applicable; accordingly, provisions of a different nature are inserted in these Acts or orders. Profits of local authorities.

737. It is commonly provided that all sums received by the authority on account of revenue are to be applied for the following Application of revenue.

(*t*) 10 & 11 Vict. c. 15, ss. 30—37; see note (*d*), p. 319, *ante*.

(*u*) As to price, see p. 337, *ante*, and pp. 367, 371, *post*.

(*a*) In the more modern legislation, ss. 30—34 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), are omitted, or impliedly repealed, but they have been incorporated in recent Acts incorporating new companies to carry on new undertakings.

(*b*) The issue of capital and other matters connected with the administration of statutory gas companies are commonly governed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with the exception of the provisions relating to the conversion of borrowed money into capital, and the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), Parts I. and III., as amended by subsequent Acts, which are incorporated in the special Act (see Model Gas Bill, 1910, clause 1), together with such other special provisions as may be necessary. Thus, power to borrow is given to the company, but the amount is usually limited to one-third or one-fourth of the paid-up capital. All moneys raised, including premiums, are to be applied as capital (*ibid.*, clauses 6—9). In addition to the clauses in the special Act and in the incorporated Companies Clauses Acts, it is provided by the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 8, that the mortgagees of the undertakers may enforce payment of arrears of interest or principal, or principal and interest due on mortgages by the appointment of a receiver, and in order to authorise the appointment of a receiver in respect of principal or principal and interest, the amount owing to the mortgagees by whom the application for a receiver is made shall not be less than, in the whole, £1,000, or such sum as shall be specified in the special Act. By s. 7 (*ibid.*) it is provided that if any money be payable to a shareholder in a gas undertaking, being a minor, idiot, or lunatic, the receipt of his or her respective guardian or committee shall be a sufficient discharge to the undertakers for the same. As to statutory companies generally, see title COMPANIES, Vol. V., pp. 674 *et seq.*

SECT. 1. In General.

purposes:—(1) in payment of the working and establishment expenses and cost of maintenance of the undertaking; (2) in payment of the interest on the money borrowed for the purposes of the undertaking; (3) in providing for the discharge, by sinking fund or otherwise, of money borrowed for the purposes of the undertaking; (4) in extending and improving any works for the purposes of the undertaking; and (5) in providing a reserve fund to meet any extraordinary expenditure in connection with the undertaking. The amount of annual revenue which may be so transferred to such fund, as well as the total amount of the fund, are often limited in the special Act. The balance in any year may be authorised to be carried to the district or borough fund or rate, but it is also provided that no such sum shall be so transferred until the price of gas to private consumers is reduced below a certain amount. In some cases such transfer to the district or borough fund has not been allowed and provision has been made for the application of any profit balance in the reduction of the price of gas to the consumers (*c*). Deficiency in the revenue is authorised to be made good out of such fund or rate, but certain expenditure may not be so met unless the price of gas to private consumers is above a certain sum (*d*).

Balance of revenue.

SECT. 2.—*Under Gasworks Clauses Act*, 1847.

Limit of dividend.

738. The profits of the undertaking to be divided among the undertakers in any year must not exceed the rate prescribed in the special Act, or, if no rate is prescribed, they must not exceed £10 per cent. per annum on the paid-up capital, and this is to be deemed the prescribed rate. If, however, any yearly dividend shall have fallen short of that yearly rate, a larger dividend than that prescribed may be paid to make up that deficiency (*e*). The company may not pay the prescribed rate free of income tax (*f*).

Excess profits to form reserve fund.

739. If the clear profits in any year amount to a larger sum than is sufficient, after making up the deficiency in the dividends of any previous year, to make a dividend at the prescribed rate, the excess beyond the sum necessary for that purpose must be invested from time to time in Government or other securities. The dividends and interest arising from such securities must also be invested in

(*c*) See Glasgow Gas Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxxi.), ss. 25, 50.

(*d*) Reference should be made to recent special Acts and to provisional orders of the Local Government Board under the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), for the particular terms of these provisions in different cases. Local authorities, by these Acts and orders, are generally authorised, for the purpose of carrying on the undertaking, to borrow on the security of the works and on the local fund or rate.

(*e*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 30; and compare *Chamberlain* v. *New Worcester Gas Light Co.* (1875), *Times*, 5th June, a case under rather different provisions in the special Act. The prescribed rate of dividend is now commonly 7 per cent. for ordinary shares and 5 per cent. or 6 per cent. for preference shares.

(*f*) *Ashton Gas Co.* v. *A.-G.*, [1906] A. C. 10. As to the income tax payable by gas companies, see title INCOME TAX.

the same or like securities, in order that the same may accumulate at compound interest until the fund so formed amounts to the sum prescribed for this purpose in the special Act, or, if no sum is prescribed, until it amounts to a sum equal to one-tenth of the nominal capital of the undertakers. This sum is to form a reserve fund to answer any deficiency which may at any time happen in the amount of the divisible profits, or to meet any extraordinary claim or demand which may at any time arise against the undertakers. If the fund is at any time reduced, it may afterwards be restored to the said sum, and so from time to time as such reduction happens (*g*). If in any year the profits divisible amongst the undertakers do not amount to the prescribed rate, such a sum may be taken from the reserve fund as, with the actual divisible profits of such year, will enable the undertakers to make a dividend of that amount, and so from time to time as often as the occasion shall require (*h*). No sum of money may, however, be taken from that fund for the purpose of meeting any extraordinary claim, unless it is first certified by two justices that the sum proposed to be taken is required for the purpose of meeting an extraordinary claim within the meaning of the special and incorporated Acts (*i*).

Application of surplus.

740. When the fund, by accumulation or otherwise, amounts to the prescribed sum, or to one-tenth of the nominal capital, as the case may be, the interest and dividends may no longer be invested, but are to be applied to any of the general purposes of the undertaking to which the profits thereof are applicable (*k*).

Reduction of price of gas.

741. On the petition of any two gas ratepayers within the limits of the special Act, the court of quarter sessions may nominate and appoint some accountant, or other competent person not being a proprietor of any gasworks (*l*), to examine and ascertain, at the expense of the undertakers, the actual state and condition of the concerns of the undertakers, and to make report thereof to that court at the same or some following sessions. The expense of the examination is to be determined by the court (*m*). When such report is made, the court may examine any witness upon oath touching the truth of the said accounts (*n*) and the matters therein

(*g*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 31; compare these clauses with the new provisions, pp. 369 *et seq.*, *post*.

(*h*) *Ibid.*, s. 34.

(*i*) *Ibid.*, s. 32.

(*k*) *Ibid.*, s. 33.

(*l*) The court cannot appoint more than one person, as, for example, an accountant and an engineer to assist him (*R.* v. *Brindley* (1886), 54 L. T. 435). It would seem that the accountant appointed cannot take another person with him to examine the books (*ibid.*, *per* CAVE, J., at p. 437). In that case it was also decided that an order of the quarter sessions appointing two persons may be brought up to the High Court by writ of *certiorari* and quashed. In some special Acts the local authority has been empowered to apply to the court instead of and as well as the two ratepayers; see, for example, Scarborough Gas Act, 1895 (58 & 59 Vict. c. xxxviii.), s. 19. As to courts of quarter sessions, generally, see title MAGISTRATES.

(*m*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 35. These costs do not include the costs of the petitioners at the inquiry, but will include the costs of the examiner (*R.* v. *Hanley Recorder* (1887), 19 Q. B. D. 481).

(*n*) The statute uses these words, but no accounts have been referred to

SECT. 2. Under Gasworks Clauses Act, 1847.

referred to, and if it thereupon appears to the court that the profits of the undertakers for the preceding year have exceeded the prescribed rate, the undertakers must, in case the whole of the said reserve fund has been and then remains invested, and in case dividends to the amount hereinbefore limited have been paid, make such a rateable reduction in the rate for gas to be furnished by them as in the judgment of the court shall be proper, but so as such rates when reduced shall ensure to the undertakers a profit as near as may be to the prescribed rate, regard being had to the amount of profit before received (*o*). The court has no jurisdiction, however, to order a reduction in the price of gas, when the reserve fund has not been invested and the prescribed dividend has not been paid, even although the reserve fund might have been invested and the prescribed dividend paid if the company had not made illegal payments and appropriations (*p*).

Costs of petition.

742. If it appears to the court that there were no sufficient grounds for presenting the petition, the court may, if they think fit, order the petitioner to pay the whole or any part of the costs of, or incident to, such petition, the amount thereof to be determined by the court, and such costs are recoverable by distress if not paid within seven days after demand (*q*).

Production of books.

743. The court cannot order the company to produce their books to the accountant appointed (*r*), but if the undertakers for seven days after being required to produce to the court, or to the accountant, or other person, any books of account or other books, bills, receipts, vouchers, or papers relating to the pecuniary affairs of the undertakers, refuse or neglect to produce the same, they are liable to forfeit the sum of £100 for every such refusal or wilful neglect, and the further sum of £10 for every day such refusal or wilful neglect continues after the expiration of the said seven days. Such respective penalties may be recovered by any person who will sue for the same in any of the superior courts, with full costs of suit (*s*).

previously. See, however, Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 38, as to annual accounts to which these may refer, and *R.* v. *Hanley Recorder* (1887), 19 Q. B. D. 481, 488.

(*o*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 35.

(*p*) *R.* v. *Hanley Recorder*, *supra*. In modern special Acts and provisional orders, where the more recent provisions as to limitation of profits are introduced, s. 35 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), is either omitted, or, if inserted, the words "in case the whole of the said reserved fund has been and then remains invested as aforesaid and in case dividends to the amount hereinbefore limited have been paid" are expressly omitted. The court cannot reduce the price where s. 35 (*ibid.*) is omitted altogether, and the gas consumers have no remedy except through the Attorney-General (*Mason* v. *Ashton Gas Co.* (1886), 54 L. T. 708, C. A. ; and see *Johnston and Toronto Type Foundry Co.* v. *Consumers' Gas Co. of Toronto*, [1898] A. C. 447, P. C.).

(*q*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 36. As to recovery of costs, see *ibid.*, s. 40, and pp. 373 *et seq.*, *post*. As to the costs of the petitioners, see note (*m*), p. 367, *ante*.

(*r*) *R.* v. *Brindley* (1886), 54 L. T. 435, 437.

(*s*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 37. The accountant and court are not limited to the accounts of the year in question, and may examine the accounts of previous years for the purpose of ascertaining the

SECT. 3.—*Modern Enactments as to Profits.*

Standard rates of dividend.

744. Under the provisions now commonly inserted in gas Acts (*t*) the profits of the company to be divided among the shareholders in any year must not exceed the following rates, which are referred to as the standard rates of dividend, that is to say, on the original capital the rate of £10 in respect of every £100 of such capital (*a*), and, on the additional capital, the rate of £7 in respect of every £100 actually paid up of such capital as shall be issued as ordinary capital, and the rate of £5 (*b*) in respect of every £100 actually paid up of such capital as shall be issued as preference capital (*c*). If in any half-year the funds of the company applicable to dividend are insufficient to pay the prescribed maximum rate on each class of ordinary stock or shares in the capital of the company, a proportionate reduction is to be made in the dividend of each class (*d*).

Power to create a special purposes fund.

745. The directors of the company may, if they think fit, in any year appropriate out of the revenue of the company, as part of the expenditure on revenue account, any sum not exceeding 1 per cent. of the paid-up capital of the company, including premiums (*e*), to a fund to be called the "special purposes fund." This fund is to be applicable only to meet such charges as a chartered accountant or incorporated accountant, being the auditor of the company or appointed for the purpose by the Board of Trade, shall approve as being either expenses incurred by reason of accidents, strikes, or circumstances which due care and management could not have prevented, or expenses incurred in the replacement or removal of plant or works other than expenses requisite for maintenance and renewal of plant and works. The maximum amount standing to the credit of the special purposes fund may not at any time exceed an amount equal to one-tenth part of the paid-up capital of the company, including premiums. The money forming the fund, or

actual condition of the concern at the date of the examination, but such accounts cannot be reopened (*R.* v. *Hanley Recorder* (1887), 19 Q. B. D. 481, 488, 489).

(*t*) These provisions in their most recent form will be found in the Model Gas Bill, 1910; see clauses 10—15, 20. The evolution of the new clauses began in 1875, and a standing order of the House of Commons in relation to them has existed since 1877; see Standing Order 188, and p. 312, *ante*. When these provisions are introduced, the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 30—34, is omitted, but ss. 35—37 are included, s. 35 being modified; see note (*p*), p. 368, *ante*. In some special Acts ss. 30—37 (*ibid.*) are all excluded, as in the Ashton Gas Act, 1877 (40 & 41 Vict. c. clxxxvi.), upon the construction of which *Mason* v. *Ashton Gas Co.* (1886), 54 L. T. 708, C. A., was decided.

(*a*) Compare Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 30, p. 366, *ante*. In some cases the original capital has been allowed to be converted into a share capital of double the amount, on which the rate of dividend is fixed at 5 per cent.

(*b*) This amount varies according to the particular case.

(*c*) Model Gas Bill, 1910, clause 10.

(*d*) *Ibid.*, clause 11.

(*e*) It is a common provision in special Acts to provide that any sums of money which may arise by way of premium from the issue of shares or stock are not to be considered as part of the capital entitled to dividend (*ibid.*, clause 9). As to how new capital is to be issued, see p. 370, *post*.

SECT. 3. Modern Enactments as to Profits.

any portion thereof, may be invested in securities in which trustees are authorised by law to invest, or may be applied to the general purposes of the company to which capital is properly applicable, or may be used partly in the one way or partly in the other, and resort may be had to the fund from time to time, notwithstanding that the sum standing to the credit of the fund is for the time being less than the maximum allowed (*f*).

Excess profits to be carried forward.

746. If the clear profits of the undertaking in any year amount to a larger sum than is sufficient to pay the authorised rates of dividend, the excess must be carried to the credit of the divisible profits of the undertaking for the next following year, but the sum so carried forward must not exceed in any case the amount required to pay one year's dividend at the authorised rates (*g*).

Formation of reserve fund.

747. The company may also form a reserve fund, which is to be applicable to the payment of dividend in any year in which the clear profits of the company are insufficient to enable the company in such year to pay the dividend at the authorised rate on the ordinary capital. This reserve fund may be formed in the following way. Where in any year the dividend of the company on the ordinary capital exceeds the standard rate by reason of the price charged by the company for gas being below the standard price (*h*), then out of the amount of the divisible profits of the company applicable to the payment of such excess of dividend the company may in such year set apart such sum as they shall think fit, and all sums (if any) so set apart, and any reserve or other fund of the company existing at the passing of the special Act, may be invested in Government or other securities, and the dividends and interest arising from such securities may also be invested in the same or like securities, in order that the same may accumulate at compound interest (*i*).

Shares and stock to be sold by auction or tender.

748. Shares and stock to be issued under the powers of the special Act must be offered for sale by public auction or tender. This may be done at such times and subject to such conditions of sale as the company may from time to time determine, but subject also to certain conditions prescribed in the special Act, and intended to secure that a fair price should be obtained, as, for example, by requiring a reserve price to be fixed (*k*).

(*f*) Model Gas Bill, 1910, clause 12. If the company has had an insurance fund a clause is inserted transferring the money or securities standing to its credit to the credit of the special purposes fund.

(*g*) *Ibid.*, clause 13.

(*h*) As to standard price and sliding scale, see p. 371, *post*.

(*i*) Model Gas Bill, 1910, clause 14. There is no limit to the amount of this reserve fund as in the case of that under the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 33; see p. 366, *ante*. As to remedies for breach of these provisions, see *Mason* v. *Ashton Gas Co.* (1886), 54 L. T. 708, C. A.

(*k*) The conditions in the Model Gas Bill, 1910, clause 15, are as follows:—(a) Notice of the intended sale shall be given in writing to the town clerk of —— and to the secretary of the London Stock Exchange at least twenty-eight days before the day of auction or the last day for the reception of tenders, as the case may be, and shall also be duly advertised once in each of two consecutive weeks in one or more local newspapers circulating within the said [borough]; (b) a reserve price shall be fixed, and notice thereof shall be sent by the com-

Shares and stock so offered for sale and not sold may be offered at the reserve price to the holders of ordinary and preference shares or stock of the company in accordance with conditions laid down by statute (*l*), and to the employees of the company, and to the consumers of gas supplied by the company in such proportions as the company may think fit, or to one or more of these classes of persons only. In the case of an offer to holders of shares or stock, if the aggregate amount of shares or stock applied for exceeds the aggregate amount so offered, the same must be allotted to and distributed amongst the applicants as nearly as may be in proportion to the amounts applied for by them respectively. Any shares or stock still remaining after these two offers of sale must be again offered for sale by public auction or tender in the same manner as in the case of the first offer for sale, and any such shares or stock remaining unsold may be otherwise disposed of at such price and in such manner as the directors may determine for the purpose of realising the best price obtainable. As soon as possible after the conclusion of the sale or sales the company must send a report thereof to the Board of Trade, stating the total amount of the respective shares or stock sold, the total amount obtained as premium, if any, and the highest and lowest prices obtained for the shares and stock (*m*).

Sliding scale of price and dividend.

749. The provision of a sliding scale to regulate the price of the gas forms an important, but not a necessary, part of the modern legislation for limiting profits (*n*). Under this provision a standard price per 1,000 cubic feet to be charged by the company is fixed, and the company is authorised to increase or reduce the price charged by it for gas above or below the standard price subject to a reduction or increase in the dividend payable by the company on the ordinary share capital or stock. The reduction or increase

pany in a sealed letter to be received by the Board of Trade not less than twenty-four hours before, but not to be opened till after the day of auction or last day for the receipt of tenders, as the case may be; (c) no lot offered for sale shall comprise shares or stock of greater nominal value than £100; (d) in the case of a sale by tender, no preference shall be given to one of two or more persons tendering the same sum; in the case of a sale by auction a bid shall not be recognised unless it is in advance of the last preceding bid; (e) it shall be one of the conditions of sale that the total sum payable by the purchaser shall be paid to the company within three months after the date of the auction, or the acceptance of the tender, as the case may be. For forms of particulars and conditions of sale, see Encyclopædia of Forms and Precedents, Vol. IV., pp. 829, 835.

(*l*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 18—20; see title COMPANIES, Vol. V., pp. 681—684.

(*m*) Model Gas Bill, 1910, clause 15 (3), (4), (5). This clause is commonly referred to as the auction clause. By the South Metropolitan Gas Act, 1901 (1 Edw. 7, c. clxxxix.), s. 6, unissued stock may, subject to certain conditions and limitations, be offered to the gas consumers and persons in the employ of the company at the average market price before being offered for sale by public auction or tender.

(*n*) In provisional orders made by the Board of Trade under the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70) (see pp. 312 *et seq.*, *ante*), the price is often limited by the fixing of a maximum price, but it is provided that the Board of Trade may, after a certain number of years, alter the maximum price either by fixing another maximum or by providing for a sliding scale of prices.

SECT. 3. Modern Enactments as to Profits.

is determined in this way: in respect of any year during any part of which the price charged by the company shall have been one penny or part of a penny above the standard price, the dividend payable by the company is required, in respect of each penny or part of a penny by which the standard price shall have been increased, to be reduced below the standard rate of dividend by a certain amount on every £100 of ordinary paid-up capital, and so in proportion for any fraction of £100, and in respect of any year during the whole of which the price charged by the company shall have been one penny or more below the standard price, the dividend payable by the company may, in respect of each penny by which the standard price shall have been reduced, be increased above the standard rate by a certain amount on every £100 of paid-up capital, and so in proportion for any fraction of £100 (*o*). This provision confers no right on the gas consumer to have the price of the gas reduced unless a larger dividend than the standard one is paid (*p*).

SECT. 4.—*Accounts.*

Companies to keep annual accounts.

750. Under the Gasworks Clauses Act, 1847 (*q*), the undertakers are required in each year after they have begun to supply gas under the provisions of the special and incorporated Acts to cause an account in abstract to be prepared of the total receipts and expenditure of all rents or funds levied under the powers of such Acts for the year preceding under the several distinct heads of receipt and expenditure, with the statement of the balance of the account duly audited and certified by the chairman of the undertakers, and also by the auditors thereof, if any. A copy of this annual account must be transmitted free of charge to the clerk of the peace for the county in which the gasworks are situated, on or before the 31st January in each year, under a penalty of £20 for each default. The copy of the account so sent to the clerk of the peace must be kept by him, and be open to inspection by all persons at all reasonable hours on payment of 1*s.* for each inspection.

Accounts to be sent to local authority.

751. Under the Gasworks Clauses Act, 1871 (*r*), the undertakers are required to fill up and forward to the local authority of every district within the limits of the special Act, on or before the

(*o*) Model Gas Bill, 1910, s. 20. The rate of reduction or increase commonly fixed is 5*s.* per cent. with a 10 per cent. rate of dividend, and 3*s.* 6*d.* per cent. with a 7 per cent. standard rate of dividend. In some special Acts a provision has been inserted allowing the price per 1,000 feet to be raised or lowered between certain limits without the dividend being affected, and outside these limits or neutral zone, as it has been called, the sliding scale operates.

(*p*) See *Mason* v. *Ashton Gas Co.* (1886), 54 L. T. 708, C. A. If the price is not lowered consumers might apply for an injunction to restrain the company from paying a dividend above the standard (*ibid.*, at p. 712), or they might apply for a reduction in the price under the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 35, when that section is incorporated; see p. 367, *ante*.

(*q*) 10 & 11 Vict. c. 15, s. 38. This clause and the one referred to in the next note are not inserted in Acts or provisional orders authorising local authorities to carry on gas undertakings.

(*r*) 34 & 35 Vict. c. 41, s. 35.

25th March in each year, an annual statement of accounts made up to the 31st December then next preceding. This statement is to be in a certain form and to contain certain particulars (*s*). The undertakers are required to keep copies of such annual statement at their office, and to sell the same to any applicant at a price not exceeding 1*s*. If the undertakers make default in complying with these provisions they become liable to a penalty not exceeding 40*s*. for each day during which such default continues (*t*).

Accounts of local authorities.

752. When local authorities are authorised to carry on gas undertakings by special Act or provisional order, it is commonly required that the council shall keep the accounts of their gas undertaking separate from all other accounts, and that these accounts shall be made up and balanced annually, and be audited in the same manner and with the like consequences as their other accounts (*u*).

Part VII.—Legal Procedure.

Penalties under Gasworks Clauses Acts.

753. For the purpose of the recovery of damages not specially provided for, and of penalties (*w*) under the Gasworks Clauses Act, 1847 (*a*) or 1871 (*b*), and for the purpose of the determination of any other matter referred to justices, there are incorporated in the Gasworks Clauses Act, 1847 (*c*), those clauses of the Railways Clauses Act, 1845 (*d*), of which the introductory words are, "with respect to the recovery of damages not specially provided for, and of penalties and to the determination of any other matter referred to justices" (*e*). The general effect of these clauses is that those

(*s*) The form and particulars are contained in Sched. B to the Act, and the statement must be as near as may be in that form and contain those particulars. The Board of Trade may, however, with the consent of the undertakers, alter the said forms for the purpose of adapting them to the circumstances of the undertaking or of better carrying into effect the objects of the section (Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 35). As to the application of the Act, see *Dudley Gas Co.* v. *Warmington* (1881), 50 L. J. (M. C.) 69. In the case of an Act passed in 1865, which prescribed a form of accounts, it was held that the above section did not apply (*Leamington Priors Gas Co.* v. *Davis* (1886), 18 Q. B. D. 107).

(*t*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 38.

(*u*) It is usual to make up these accounts in a form similar to that prescribed *ibid.*, s. 35. As to accounts of municipal undertakings, see Model Bills and Clauses, 1910, Miscellaneous, No. 20; as to returns to Local Government Board in respect of repayment of moneys borrowed, see *ibid.*, No. 19; and see, generally, title LOCAL GOVERNMENT.

(*w*) For various provisions as to penalties, see pp. 320, 329, 334, 337, 340, 342, 353—356, 368, 372, *ante*. For other offences, see pp. 347—350, *ante*, as to meters; pp. 357, 358, *ante*, as to breach of contract for supply; pp. 360—364, *ante*, as to nuisances; and pp. 379 *et seq.* as to defects and nuisances in the metropolis.

(*a*) 10 & 11 Vict. c. 15.

(*b*) 34 & 35 Vict. c. 41. S. 44 (*ibid.*) provides that all offences and penalties under this Act, and all money forfeited, and all money and costs by this Act directed to be recovered as penalties, may be prosecuted and recovered in manner directed by the Gasworks Clauses Act, 1847, with respect to the recovery of penalties.

(*c*) 10 & 11 Vict. c. 15, s. 40.

(*d*) 8 & 9 Vict. c. 20.

(*e*) *Ibid.*, ss. 140—160, as amended by the Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43); 1879 (42 & 43 Vict. c. 49); and 1884 (47 & 48 Vict. c. 43). See also title RAILWAYS AND CANALS.

PART VII. Legal Procedure.

penalties, damages, and other matters are to be recovered and determined by two justices, or by a magistrate authorised to act alone (*f*), and sums not paid within seven days after demand may be recovered by distress. An appeal from the magistrates' decision lies to quarter sessions. Damage done to the works of the company may be recovered in the same way in addition to the penalty. Power is also given to officers of the company to seize and detain offenders whose names and residences are unknown to them.

Penalties for false evidence.

754. Every person who, upon any examination upon oath under the provisions of the special or incorporated Acts, wilfully and corruptly gives false evidence is liable to the penalties of wilful and corrupt perjury (*g*).

Penalties not cumulative.

755. Penalties imposed on the undertakers for one and the same offence by several Acts of Parliament are not to be cumulative, and for that purpose the special Act and the Acts incorporated therewith are to be deemed separate Acts (*h*).

Application of penalties in metropclitan police area.

756. Every penalty or forfeiture imposed by the special or incorporated Acts, or by any bye-law in pursuance thereof, in respect of any offence which takes place within the metropolitan police district, is to be recovered, enforced, accounted for, and, except where the application is otherwise specially provided for, is to be paid to the receiver of the metropolitan police district and applied in the same manner as penalties or forfeitures, other than fines upon drunken persons, or upon constables for misconduct, or for assaults upon police constables, are directed to be recovered, enforced, accounted for, paid, and applied by the Metropolitan Police Courts Act, 1839 (*i*). Every order or conviction of any police magistrate in respect of any such penalty or forfeiture is subject to the like appeal and upon the same terms as are provided in respect of any order or conviction of any police magistrate in that Act, and every magistrate by whom any order or conviction is made has the same power of binding over the witnesses who shall have been examined, and the witnesses are entitled to the same allowance of expenses as they would have been entitled to in case the order, conviction, and appeal had been made pursuant to that Act (*k*).

Contents of summons or warrant.

757. Any summons or warrant issued for any of the purposes of the Gasworks Clauses Act, 1871 (*l*), may contain in the body thereof, or in a schedule thereto, several names and several sums. Any

(*f*) As to a magistrate acting alone, see Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 42; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 33; and see title MAGISTRATES.

(*g*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 44; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 491 *et seq.*

(*h*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36; and see also Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33. As to penalties in connection with meters, see Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), and pp. 347—350, *ante*.

(*i*) 2 & 3 Vict. c. 71; see s. 47 (*ibid.*).

(*k*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 43.

(*l*) 34 & 35 Vict. c. 41, s. 42.

justice who issues a warrant of distress in pursuance of the provisions of that Act may order that the costs of the proceedings for the recovery of the money to be levied shall be paid by the person liable to pay such money, and such costs shall be ascertained by the justice and included in the warrant of distress for the recovery of such money (*m*).

Justices not disqualified.

758. No justice or judge of any county court or quarter sessions shall be disqualified from acting in the execution of the Gasworks Clauses Act, 1871 (*n*), by reason of his being liable to the payment of any gas rent or other charge under that Act.

Service of notices.

759. Every notice which the undertakers are by the Gasworks Clauses Act, 1871 (*o*), required to serve upon any person must be served by being delivered to the person for whom it is intended, or by being left at his usual or last known place of abode, or sent by post addressed to such person, or if such person or his address be not known to the undertakers, and cannot after due inquiry be found or ascertained, then by being affixed for three days to some conspicuous part of the premises to which such notice relates.

Part VIII.—Gas Supply in the Metropolis.

SECT. 1.—*In General.*

Metropolitan gas supply.

760. Gas is supplied throughout the metropolis, with the exception of certain parts (*p*), by three companies, namely, the

(*m*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 43.

(*n*) *Ibid.*, s. 46. The expression "this Act" is used in the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), ss. 42—46. In s. 44 (*ibid.*) it is used in contra-distinction to the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), but by the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 1, these two Acts are to be construed as one.

(*o*) 34 & 35 Vict. c. 41, s. 45.

(*p*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 5 and schedule. Certain companies, nine in number, and now reduced by amalgamation with the principal London companies, were excepted from the operation of this Act, and the expression "the metropolis" is defined as having the same meaning as in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) (see title METROPOLIS), but the districts severally specified and described in the Acts and instruments of incorporation mentioned in the schedule, or within which the said companies, or any of them, were in 1860 supplying gas (notwithstanding the said districts, or any portions thereof, might be within the limits of the metropolis as above defined), were not to be deemed included in the expression "the metropolis," or any extension thereof which might thereafter be made under the provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120); but if the said companies, or any of them, should supply gas in parts of the metropolis other than those within their respective districts as defined in the said schedule, then the provisions of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), are to apply to such companies, respectively, so far only as regards such extended limits as may be within the metropolis. These companies are the Crystal Palace District Gas Company, the Wandsworth and Putney Gas Light and Coke Company, the Brentford Gas Company, the West Ham Gas Company (each of whose districts is that defined by their special Act), the Eltham Gas Light and Coke Company, Limited (whose district is the parish of

SECT. 1. **In General.**

Districts of companies.

Commercial Gas Company, the Gas Light and Coke Company, and the South Metropolitan Gas Company (*q*). These companies are governed partly by statutes applicable to the metropolis as a whole, with the exception of certain parts, and partly by their own special Acts (*r*). To each company a certain district is limited, and, subject to certain rights existing on the 28th August, 1860 (*s*), no other company or person than the company to whom limits are for the time being assigned may supply gas for sale within the said limits, unless authorised by Parliament so to do (*t*), nor may such other company or person supply gas to be consumed within these limits, although the meter through which the gas is supplied is within its or his own district and on the property of the consumer (*u*). The limits as fixed on the 28th August, 1860, were shown upon four duplicate maps deposited with the clerks of the peace for the counties of Middlesex, London, Surrey, and Kent, and provision was made for the alteration in certain events of these limits at the expiration of every three years from that date (*a*). The South

Eltham), and the Mitcham, Merton and Tooting Gas Company (whose district is the parishes and villages of and adjacent to Mitcham, Merton and Tooting).

(*q*) There were in 1860 thirteen metropolitan gas companies, but these have been reduced to three by amalgamation; see preamble to Metropolitan Gas Act, 1860 (23 & 24 Vict. c. 125).

(*r*) The Acts generally applicable are the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125); Metropolis Gas Act, 1861 (24 & 25 Vict. c. 79); part of the City of London Gas Act, 1868 (31 & 32 Vict. c. cxxv.); Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.); Metropolis Gas (Prepayment Meter) Act, 1900 (63 & 64 Vict. c. cclxxii.); and the London Gas Act, 1905 (5 Edw. 7, c. clv.). It is intended in this title to deal only with these general Acts, and not with the special Acts, save in so far as they have repealed or amended the general Acts, or are necessary for their explanation.

(*s*) The date of the passing of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125). S. 54 (*ibid.*) provides that nothing therein should avoid, prejudice, or impair the powers then exercised by or vested in the Metropolitan Board of Works (now exercised by or vested in the London County Council), or in the Commissioners of Sewers of the City of London, and the liberties thereof (now exercised by or vested in the Common Council of the City), or any powers then vested in any local authority within the metropolis or any powers then exercised or possessed in respect of the manufacture and supply of gas within the metropolis, by any railway company, or by any other person making or supplying gas for his or their own use, and not making or supplying gas to the public as a trade or business. A railway company which received gas outside one of the districts, and conveyed it into that district to light a station and other places in which the company had an interest, were held to come within that exemption (*Imperial Gas Light and Coke Co.* v. *West London Junction Gas Co.* (1867), 15 L. T. 66; affirmed *sub nom. Imperial Gas Light and Coke Co.* v. *West London Junction Gas Co. and Great Western Rail. Co.* (1867), 56 L. J. (CH.) 862, n., and discussed at length in *Gas Light and Coke Co.* v. *South Metropolitan Gas Co.* (1889), 62 L. J. (CH.) 123, H. L.).

(*t*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 6.

(*u*) *Gas Light and Coke Co.* v. *South Metropolitan Gas Co., supra;* followed in *A.-G.* v. *West Gloucestershire Water Co.*, [1909] 1 Ch. 636; affirmed, [1909] 2 Ch. 338, C. A.

(*a*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 6. By that section the Home Secretary, for whom the Board of Trade has been substituted by the special Acts of the three companies, is empowered, upon the application and with the consent of any two or more of the said gas companies whose districts adjoin one another, to make any alteration in the boundaries of such districts, or upon the application of any local authority, or upon the requisition of not

Metropolitan Gas Company has power to amalgamate its undertaking with that of any other gas company supplying gas in the metropolis on the south side of the Thames, and the companies have general powers of amalgamation (*b*).

Application of Acts.

761. The Gasworks Clauses Act, 1847 (*c*), applies to the three companies before mentioned (*d*), except in so far as the provisions thereof are inconsistent with the Metropolis Gas Act, 1860 (*e*), and except the clauses with respect to the amount of profit to be received by the undertakers from the gasworks carried on for their benefit (*f*). The Gasworks Clauses Act, 1871 (*g*), inasmuch as it is to be construed with the Gasworks Clauses Act, 1847, as one Act, is also applicable to the three companies (*h*), save where it is expressly excepted, as in the case of the Commercial Gas Company (*i*).

Issue of new capital.

762. The issue of new capital by the companies is regulated by auction clauses, with a variation in the case of the South

less than twenty gas consumers within any district or districts proposed to be affected, and upon proof to his satisfaction being given that any of the said gas companies are not in a condition adequately to supply with gas their respective districts, or have substantially failed to fulfil the obligations imposed by this Act, to make such alterations in the boundaries of such districts or admit any new company respectively as he thinks proper. All such alterations are to be certified and deposited with the said clerks of the peace and to be binding on all parties. Before proceeding to consider the necessity for altering any of the said districts, the Board of Trade must cause at least one month's notice to be given of such application to all parties interested or affected, and such notice must state the day and hour when, and the place where, such application will be considered. Notices to be given to any gas company must be left with the secretary or some other principal officer of the company, and notices to be given to any local authority must be left with the clerk or some other principal officer of the said local authority. The costs of and incident to any inquiry and decision of the Board of Trade are to be borne and paid by such parties as the Board shall direct, and such decision may, upon an *ex parte* application, be made a rule of the High Court (Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 13).

(*b*) South Metropolitan Gaslight and Coke Co.'s Act, 1876 (39 & 40 Vict. c. ccxxix.), s. 64; and as to other companies, see City of London Gas Act, 1868 (31 & 32 Vict. c. cxxv.), ss. 18—24, which regulate the procedure for such amalgamations; and Gaslight and Coke Co.'s Act, 1871 (34 & 35 Vict. c. lxxv.), s. 56.

(*c*) 10 & 11 Vict. c. 15; and see p. 317, *ante*.

(*d*) See p. 376, *ante*.

(*e*) 23 & 24 Vict. c. 125, s. 2.

(*f*) These clauses have been excepted by the special Acts of the companies, including the provision in the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2, restricting the rate of dividend, see South Metropolitan Gaslight and Coke Co.'s Act, 1869 (32 & 33 Vict. c. cxxx.), s. 4; Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 3; and Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), s. 8.

(*g*) 34 & 35 Vict. c. 41; and see p. 317, *ante*.

(*h*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 1; and *Commercial Gas Co.* v. *Scott* (1875), L. R. 10 Q. B. 400; *South Metropolitan Gaslight and Coke Co.* v. *Noakes* (1889), 61 L. T. 556, and cases cited note (*z*), p. 318, *ante*. In the South Metropolitan Gas Act, 1881 (44 & 45 Vict. c. clxxii.), s. 2, it is also provided that the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), shall apply to the existing undertaking of the company as if the same were thereby authorised, and there is a similar provision in the South Metropolitan Gas Act, 1882 (45 & 46 Vict. c. xxxviii.), s. 2. In the Gas Light and Coke Co.'s (Capital Consolidation) Act, 1898 (61 & 62 Vict. c. clxxii.), s. 21, and Sched. A, Part II., the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), is included among the general Acts applicable to that company.

(*i*) Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 3.

SECT. 1. In General.

Metropolitan Gas Company, allowing the company before auction to offer it under certain conditions to consumers of gas and to those employed by the company (*k*).

SECT. 2.—*Laying of Pipes.*

Statutory application.

763. The laying of gas pipes and mains in the metropolis is governed not only by the provisions of the Gasworks Clauses Act, 1847, with respect to the breaking up of streets for the purpose of laying pipes (*l*), but by various other special and general Acts containing similar as well as additional provisions (*m*).

Other restrictions.

There are general provisions regulating the laying of pipes in metropolitan boroughs and in the City of Westminster (*n*) which require a like notice of intention to break up the streets to be given to the council as under the Gasworks Clauses Act, 1847 (*o*), and similar superintendence and reinstatement, but it is further required that the notice should state the name of the street, and the particular part thereof, in which the pavement, surface, or soil is intended to be broken up, the day on which the work is proposed to be commenced, and the time within which it will be completed. In cases of emergency the notice

(*k*) Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), ss. 13—16; South Metropolitan Gas Act, 1896 (59 & 60 Vict. c. ccxxvi.), ss. 5, 9—13; South Metropolitan Gas Act, 1901 (1 Edw. 7, c. clxxxix.), ss. 6—8, 11, 12; Commercial Gas Act, 1902 (2 Edw. 7, c. cxxxiv.), ss. 15—19; and see, as to form of auction clause, p. 370, *ante*.

(*l*) 10 & 11 Vict. c. 15, ss. 6—12. As to the application of this Act to the metropolitan companies, see Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2.

(*m*) These Acts are: (1) the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.) (commonly known as Michael Angelo Taylor's Act), so far as not impliedly repealed by other legislation. Its operation is expressly saved by the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 47, but as to its implied repeal, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 247. The clauses which may still have operation are s. 13, giving the local authority (now the borough or city councils) power to examine plans of gas mains and pipes; s. 14, requiring officers of companies having pipes below the street to send their names and places of abode to the said councils; s. 15, relating to repairs of defective pipes; s. 18, relating to removal of rubbish and obstructions in connection with laying and repairing pipes; s. 19, repairing breaches of the pavement caused by the falling in of any pipe to be inclosed; s. 22, giving local authorities power to do works neglected by companies. (2) The Metropolis Management Act, 1855 (18 & 19 Vict. c. 155), as amended by the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), and the London Government Act, 1899 (62 & 63 Vict. c. 14). (3) In the City of London, the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), as amended by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.), and City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.). (4) Various local Acts, *e.g.*, Metropolitan Subways Act, 1868 (31 & 32 Vict. c. lxxx.), London County Council (Subways) Act, 1893 (56 & 57 Vict. c. ccii.), City of London (Various Powers) Act, 1900 (63 & 64 Vict. c. ccxxviii.). These Acts authorise the local authorities to make subways in streets, and to remove pipes into them, or to require pipes to be laid in them. (5) The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), as amended by the Metropolis Gas Act, 1861 (24 & 25 Vict. c. 79).

(*n*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 109—115. There are corresponding provisions applicable to the City in the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.).

(*o*) 10 & 11 Vict. c. 15, s. 8; and see p. 327, *ante*.

must be given within twelve hours after the work of breaking up is begun (*p*). No gaslight company is allowed at any time to break up or open any such pavement, surface, or soil for the purpose of laying down any new mains or pipes without the consent of the council in writing, except that if the council refuse or delay their consent to any company to lay down mains or pipes in accordance with the provisions of the Metropolis Gas Act, 1860, the Board of Trade may authorise the same to be laid down without such consent (*q*), but a company or person may break up or open any such pavement, surface, or soil for the purpose of laying down and attaching mains and pipes already existing to any new service pipes without such consent on giving the council three days' notice of its intention to do so (*p*). The council have power to direct the manner and time in which gas companies may open up the street (*r*). No pavement is to be considered as having been reinstated in a proper and substantial manner unless it has been reinstated with the same or similar materials, of the like quality and thickness, and cemented and bound together in the same or in an equally substantial manner as those of which it was composed in such manner as is satisfactory to the council (*s*), and the company must also reinstate to the satisfaction of the council's surveyor parts of the street contiguous to the parts broken up, which may have been affected by the works of the company (*t*).

Notice of injury to pavement from defect of pipe.

764. The borough council have also power, in case any pavement of any street in their borough be sunk, broken, injured, or damaged by reason of the breaking, bursting, or want of repair of any pipe belonging to a gas or other company, if they deem it expedient so to do, to cause notice to be given to the company, to whom such pipe is supposed to belong, forthwith well and sufficiently to repair and make good such pavement, and if the company fails within forty-eight hours to take up the pavement and sufficiently repair and amend the pipe, and cause the ground to be well and sufficiently filled in and rammed down, and the pavement to be relaid and repaired to the satisfaction of the council, the company will be liable to a penalty not exceeding £20 (*a*). If after the pavement has been taken up and the ground opened by any company in pursuance of such a notice, it is discovered that the defective pipe beneath the surface does not belong to that company, but to some other company, then the first-mentioned company must within forty-eight hours after such discovery cause a copy of the notice to be given in like manner to the company to whom the pipe belongs, and require it to obey and comply with the notice, which latter company must reimburse

If pipe belongs to another company.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 109, and City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), ss. 133 *et seq.* There are penalties provided for failure to comply with these conditions.
(*q*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 54.
(*r*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 110.
(*s*) *Ibid.*, s. 111.
(*t*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 82.
(*a*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 112.

SECT. 2. Laying of Pipes.

and pay on demand to the first-mentioned company the reasonable costs and charges incurred in and about taking up the pavement and opening the ground, and comply with the notice in all respects as if the original notice had been given to it, and it is liable to the same penalties for neglect. If the company to whom such notice was originally given, and by whom such pavement has been first taken up, and who have opened the ground, neglects to give the notice to the company to which the pipe actually belongs, it renders itself liable to a penalty not exceeding £20 (*b*).

Power of council to reinstate.

765. The council of the borough have also power, whenever the permanent surface or soil of any street in the borough is broken up or opened, if they think it expedient so to do, to fill in the ground and do all necessary work, instead of permitting the person or company to do so, and the expenses of filling in such ground and of making good the pavement or soil so broken up or opened are to be repaid on demand to the council by such person or company (*c*).

To contract with companies for reinstatement.

Borough councils may also contract and agree for any term of years, or otherwise, with the several companies or persons authorised to take up any of the pavements or other formed surface of any of the streets in their borough, for filling in, paving, and restoring such parts of the said streets as may be from time to time required to be taken up for the purpose of laying, altering, or repairing any pipes or other like purpose (*d*).

Protection of water pipes.

766. For the protection of the water supply of the metropolis, it is provided that whenever any gas company or its servants, agents, or workmen, dig or sink any trench for laying any new mains or pipes, other than service pipes, for the conveyance of gas, or other apparatus, near to which any pipe belonging to the Metropolitan Water Board for conveying water or any branch or service pipe for the supply of water to any dwelling house or buildings, is laid, such gas company, its servants, agents, or workmen, must give four hours' previous notice thereof in writing to the manager, chief clerk, secretary, or engineer of such Water Board, such notice to be delivered at the principal office of the Board between the hours of 10 a.m. and 4 p.m., and must, under the inspection of such manager, chief clerk, secretary, or engineer, protect and secure every such water pipe from any injury, and repair any damage done to such water pipe. In default of repairing such damage, the gas company is liable for each default to forfeit and pay to the secretary of the Water Board, for the use of

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 113.

(*c*) *Ibid.*, s. 114. The cost of reinstatement may include the cost of laying additional concrete to prevent subsequent subsidence, when such is necessary, in order that the street should be as good, and remain as good, as it was before the excavation (*Commercial Gas Co.* v. *Poplar Borough Council* (1906), 70 J. P. 178). If the council acting under this power negligently make up the road, whereby a person suffers damage, no action lies against the gas company, notwithstanding the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 10 (*Cressy* v. *South Metropolitan Gas Co.* (1906), 70 J. P. 405).

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 115.

the Board, a sum not exceeding £5, and also the costs and expenses incurred by the Board in protecting and securing any such water pipe, or in repairing or making good any injury that may have been done thereto, such costs and expenses to be ascertained by any justice, and recovered, on summary conviction, before a magistrate (*e*).

Crossing water pipes.

767. All pipes to be laid by a gas company for the conveyance of gas must be laid at the greatest practicable distance from the nearest part of any pipe then laid down by or by the order of any water company, or by the Metropolitan Water Board, for the conveyance of water, and wherever the width of the carriageway or footpath will allow thereof must be laid at a distance of four feet at least from the nearest part of any such water pipe, unless in cases where it is unavoidably necessary to lay the gas pipe across or nearer to any water pipe, in which case the said gas pipe must, wherever practicable, be laid over and above the said water pipe at the greatest practicable distance therefrom, and so as to form therewith a right angle, or as near thereto as the situation will admit. In every such case the gas pipe so crossing the water pipe must be at least nine feet in length, so that no joint of any gas pipe shall be nearer to any water pipe than four feet at the least, where the width of the road, street, passage, court, or other place will admit. Every such gas pipe so crossing a water pipe must, for the whole length thereof, be sufficiently bedded in with good sound clay or other fit materials of a proper consistence, and well worked and rammed into the trench all round the gas pipe. In laying down such gas pipe the gas company must use such joints as are for the time being of the most improved description for preventing the leakage of gas, and must in no case join two or more gas pipes together previous to their being laid in the trench, but must lay each pipe as near as may be in its place in the trench, and in such trench properly form the jointing with the other pipes to be added thereto with proper and sufficient materials, and it must also, wherever practicable, lay, and well and sufficiently bed, each joint of the main gas pipes, and also the joints or screws of the branch or service gas pipes connecting with the main gas pipes, and also the joints of the service or branch pipes for conveying the gas from the main gas pipes to the houses and other buildings, and all other joints, inlets, apertures, or openings, which are or may be made in any of the main gas pipes belonging to the gas company, in such manner and of such material as shall, as far as reasonably practicable, prevent leakage (*f*).

Map of mains and pipes.

768. Each company must make a map of the district, within which their mains or pipes are laid, to a certain scale, and show thereon the lines, sizes, and depth beneath the surface of all their existing mains or pipes, except service pipes to existing

(*e*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 49; and as to recovering penalties, see s. 46 (*ibid.*), and Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 3. As to enforcement of orders of justices, see title MAGISTRATES.

(*f*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 50; and as to contamination of water by gas, see p. 382, *post*.

SECT. 2. Laying of Pipes.

houses, and the position of all valves, syphons, and other appliances, and must once in every year, on or before the 31st December, correct the map, and make such alterations therein or additions thereto as may be necessary to show correctly as near as may be the lines, positions, sizes, and depths of the various pipes and also their appliances. Such map must be kept in the principal office of the company, and must be open to the inspection of the local authorities and their officers generally, and to the public generally during usual office hours, who may inspect or take copies or extracts from the same, and the company may charge and take the sum of 1*s.* for each inspection of the map, and the further sum of 2*s.* 6*d.* for each extract, tracing, or copy taken of the map. If the company wilfully fail to comply with any of the requirements in respect of such map, they are liable to a penalty not exceeding £50, which two justices of the peace may adjudge (*g*).

Inspection of map.

SECT. 3.—*Nuisances and Contamination of Water Supply.*

Protection of water supply.

769. There are special provisions in the metropolis for the prevention of the contamination by gas of the water supply in addition to and partly in substitution for those contained in the Gasworks Clauses Act, 1847 (*h*). Every gas company is answerable for any damage, spoil, injury, or mischief done to any of the pipes, works, or property of the Metropolitan Water Board, or which may be sustained by the Board in consequence of any act, matter, or

(*g*) The above provision in almost identical terms occurs in the special Acts of the three companies. As to these companies, see p. 376, *ante*. As regards the Gas Light and Coke Company, see City of London Gas Act, 1868 (31 & 32 Vict. c. cxxv.), ss. 88, 89, applied generally by the Gaslight and Coke Co.'s Act, 1868 (31 & 32 Vict. c. cvi.), s. 109: the scale of the map is prescribed to be not less than five feet to the mile. As regards the South Metropolitan Gas Company, see the South Metropolitan Gaslight and Coke Co.'s Act, 1869 (32 & 33 Vict. c. cxxx.), ss. 70, 71, where the scale is three feet to the mile; and as regards the Commercial Gas Company, see the Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 70, where the scale of the map is to be not less than five feet to the mile. Somewhat similar provisions as regards maps are contained in the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 42—44, except that the scale is to be not less than six inches to the mile, and the deposit is to be made with the respective clerks of the peace for the counties in which the mains lie. These latter provisions are repealed in the case of the Commercial Gas Company and of part of the Gas Light and Coke Company's works (see Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 70; Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), s. 80), and they are probably obsolete as regards the other companies.

(*h*) 10 & 11 Vict. c. 15, ss. 21—29 (see p. 361, *ante*), applied to the London companies by the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2, as to which see *A.-G.* v. *Gaslight and Coke Co.* (1877), 7 Ch. D. 217. The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 9, also applies to the metropolitan gas companies, except the Commercial Gas Company, as to which see p. 377, *ante*. These other provisions as to contamination of water supplies are in the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 48—52. They are very similar to those in the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15); see p. 360, *ante*. There are also provisions in other Acts as to the contamination of water by gas washings and other liquids, as for example, Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 52, 53; Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), ss. 90 *et seq.*; and, in the City of London, see City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 76.

thing done or executed by such gas company or any of its servants, agents, or workmen (*i*).

SECT. 3. Nuisances and Contamination of Water Supply.

Prevention of further contamination.

770. Whenever the water supplied by the Metropolitan Water Board is contaminated or affected in any way whatsoever by the gas of any gas company, the gas company must within twenty-four hours next after notice thereof in writing signed by the secretary for the time being of such Board, or by any person using the Board's water, and left at the office of the gas company, cause measures to be taken effectually to prevent such gas from contaminating or affecting such water. If the gas company does not within forty-eight hours after such notice has been so left use all reasonable means effectually to remove the cause of such complaint and prevent all such contamination whereof notice has been given, it becomes liable in respect of each complaint, in respect of which notice has been given, to forfeit and pay to the secretary of the Metropolitan Water Board, for the use of the Board, a sum not exceeding £10 for each day during which the water supplied by the Board remains contaminated or affected by the gas of the company (*k*).

Examination of pipes to find cause of contamination.

771. In every case when upon such complaint a question arises as to whether or not the water is contaminated or affected by the gas of a gas company, the Metropolitan Water Board may dig to and about and search and examine the mains, pipes, conduits, and apparatus of the gas company adjacent to the pipes of the Board for the purpose of ascertaining whether or not such contamination proceeds from or is occasioned by the gas of the gas company, upon giving twenty-four hours' previous notice in writing signed by the

(*i*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 48; and as to transfer of rights to the Metropolitan Water Board, see Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 3, and title WATER SUPPLY; and compare Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 29, and Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 9; and see p. 359, *ante*.

(*k*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 51. Such penalty is recoverable on summary conviction before a magistrate (*ibid.*, ss. 46, 47). As to enforcement of orders of magistrates, see title MAGISTRATES. No special remedy or provision for giving relief to any person given by the said Act is to prejudice or diminish the general jurisdiction of any of the superior courts over or with respect to the acts or defaults in respect of which the special remedies or provisions are so given (*ibid.*, s. 55). It is also provided that whenever it appears to the Board of Trade that any of the provisions of the Metropolis Gas Act, 1860, have been violated or not complied with, or that the gas company are acting in a manner unauthorised by law, and if it appear to the Board that it would be for the public advantage that the gas company should be restrained from so acting, or compelled to do any act for remedying the wrongful act done by them, the Board of Trade may certify the same to His Majesty's Attorney-General, and thereupon he, if he be so advised, is required to proceed by information, action, or other proceeding, as the case requires, to restrain the wrongful acting, or to compel the doing of the acts for remedying the wrongful acts; but the Board of Trade may not give the certificate at a period exceeding one year after the commission of the offence specified in the certificate (*ibid.*, s. 45). Proceedings might also be taken under the ordinary law in the name of the Attorney-General for acts *ultra vires* or in respect of a public nuisance; see, for example, *A.-G.* v. *Gaslight and Coke Co.* (1877), 7 Ch. D. 217; and see *Pudsey Coal Gas Co.* v. *Bradford Corporation* (1873), L. R. 15 Eq. 167; *Stockport District Waterworks Co.* v. *Manchester Corporation* (1862), 9 Jur. (N. S.) 266.

SECT. 3. Nuisances and Contamination of Water Supply.

secretary of the Board and left at the head office of the company, of the intention of the Board so to dig, search, and examine, and of the time and place or places when and where such digging, search, and examination are intended to be made. If it appears that the said water has been contaminated and that there has been any escape of gas whereby such contamination has been produced, then the costs and expenses of the digging, search, and examination, and of the repair of the street, road, or place taken up or disturbed must be borne and paid by the gas company. If, however, it appears that the contamination has not arisen from any escape of gas from any of the mains, pipes, and conduits of the gas company to whom the notice was given, then the Board must bear and pay all the costs, charges, and expenses of and incident to such examination and search, and they must also make good to the gas company any damage occasioned to its mains, pipes, conduits, or apparatus by such search, and also any injury or damage done in or about any of the streets, roads, and places broken up and disturbed in such search. The amount of any such damage is to be ascertained and determined by any justice, and recovered on summary proceedings before a magistrate (*l*).

SECT. 4.—*Supply of Gas.*

Duty to supply.

772. Each gas company within its own district was required by the Metropolis Gas Act, 1860 (*m*), subject to certain conditions, to supply gas for public and private use. The provisions of the Gasworks Clauses Act, 1871, relating to such supply (*n*), apply to the Gaslight and Coke Company and the South Metropolitan Gas Company, and supersede the provisions in the Metropolis Gas Act, 1860, in so far as they are inconsistent with one another. In the case of the Commercial Gas Company the provisions of the Metropolis Gas Act, 1860, still apply (*o*).

(*l*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 52. The damage is recoverable in the same way as a penalty, as to which see *ibid.*, s. 46. As to enforcement of orders of justices generally, see title MAGISTRATES.

(*m*) 23 & 24 Vict. c. 125; see ss. 14—18 as to supply of gas and meters to owners and occupiers of premises, and s. 22 (*ibid.*) as to public lighting.

(*n*) 34 & 35 Vict. c. 41; see ss. 11, 13—23 (*ibid.*) as to supply of gas and meters to owners and occupiers of premises, and ss. 24—27 (*ibid.*) as to public lighting; and see pp. 333 *et seq.*, 342 *et seq.*, *ante*.

(*o*) See pp. 376, 377, *ante*. Under these provisions every gas company supplying gas within any district is required, as to any premises or street within such district not already supplied with gas, and which shall lie within fifty yards of any existing mains, at their own expense, on being required by the owner or occupier of any premises within the district, or in part within the district, who shall contract for not less than two years to pay gas rates in respect of such supply to an amount equal to 20 per cent. upon the outlay, to provide and lay all proper and sufficient communication, service, and other pipes up to the premises of such owner or occupier, to communicate with the gas companies' mains, and must, if so required by the owner, occupier, or local authority, furnish him or them, at the rate prescribed, with a supply of gas for the purpose of being used in or on the premises or for lighting the street, and, if so required by the owner or occupier, furnish him with one or more meters for ascertaining the quantity of gas consumed, but the company is not bound to supply more than one meter for each consumer occupying a separate dwelling or apartment, nor any meter exceeding a five-light meter; the rent which the company may charge for such meter may not exceed 10 per cent. of its net cost. Before the

SECT. 4. Supply of Gas.

Contracts for supply.

773. A gas company may, subject to various statutory provisions, enter into any contract with any owner, occupier, or local authority for all or any of the following purposes, namely, for supplying him or them with gas and with pipes, burners, meters, lamps, lamp-posts, and other apparatus, and for the repair and cleansing, and for the lighting and extinguishing thereof, in such manner and on such terms and conditions as the parties agree (*p*). Every contract without seal is binding on the company if it be signed by at least two directors, or by the secretary or other officer by the authority of at least two directors (*q*). No contract for any of the above purposes may contain any term or condition for giving, in case of difference, the sole arbitrament thereon to the gas company or to any officer or person who is or has been employed by it, or who may have any pecuniary interest in such company, or for requiring any notice by a consumer discontinuing his supply of gas or meter which shall make him liable to pay more than one month's rate or meter rent after the time of the service of the notice, or which shall entitle the gas company, except for breach of any statutory provision, to discontinue any supply of gas by less than one month's notice in writing to the consumer unless the rate due for gas shall be in arrear, in which case three days' notice in writing to the consumer is sufficient (*r*).

Public lamps.

774. As regards supply to public lamps, the local authority may provide and keep in repair their own public lamp-posts and lamps and apparatus connected therewith, and in case of their electing to

owner or occupier is entitled to have the pipes provided and laid, or to have a supply of gas or of meters furnished, he must, if so required in writing by the gas company or any of their officers, give to the company such security for the payment of the rate for the gas and the rent for every meter to be supplied to him as he and the company agree, or failing agreement, as shall be determined by a police magistrate, or in the City by a justice of the peace for the City. Any such magistrate or justice acting for the district is required, on the application of either party, to determine the nature and amount of the security to be given. The security may, as such magistrate or justice thinks fit, be the deposit with the gas company or with any person approved by such magistrate or justice, or the prepayment to the gas company, of a sum of money, or any other security which the magistrate or justice thinks sufficient and reasonable. The determination of the magistrate or justice is binding on all parties and final. If the security be the deposit with the gas company of a sum of money, the company must pay interest thereon to the consumer at such rate as the magistrate or justice determines. If the gas company, not being entitled to require or not having required any security, wilfully fails for seven days after being thereunto required in writing by the consumer, or, where the security agreed or determined as aforesaid is given, wilfully fails for fourteen days thereafter to provide and lay all proper and sufficient communication, service, and other pipes, or to furnish a supply of gas, or any meter as aforesaid, the company is liable in any such case, on summary conviction, to forfeit and pay to the consumer a penalty not exceeding 40*s.* for every day after the expiration of seven or fourteen days, respectively, during which the failure continues. Any private consumer must, if so required in writing by the company, consume the gas by meter; but any consumer may, if he thinks fit, provide his own meter (Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 14—18).

(*p*) *Ibid.*, s. 19; and compare Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 13.

(*q*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 20.

(*r*) *Ibid.*, s. 21.

SECT. 4. Supply of Gas.

burn by meter, light and extinguish the lamps, and defray the expenses thereof (*s*). The gas for public lighting must, if required by either party, be supplied by measurement, and the referees (*t*) must, if required by either party, from time to time prescribe and certify the mode of ascertaining the quantity of gas consumed by the public lamps (*a*).

Price for gas.

775. The price which may be charged for gas for public and private use is regulated by the special Acts of the companies. There is a prescribed standard price and standard dividend, and a sliding scale in respect of each company, according to which the price and dividend may vary (*b*). In the case of prepayment meters the charge must be the same as to other gas consumers (*c*). The company must not charge for any prepayment meter and fittings to be used therewith any sum other than a sum of money calculated according to the quantity of gas supplied through such prepayment meter, and the maximum sum to be so charged is to be at the rate of 10*d.* per 1,000 cubic feet supplied in manner aforesaid, such sum to include the hire of one meter and the fittings used therewith, and also the providing, letting, fixing, repairing, and maintenance of the meter and fittings, and the cost of collection, inspection, and any other cost incurred by the company in connection with the meter and fittings (*d*). The maximum charge for the hire of a

Prepayment meters.

(*s*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 23; and see also Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 130; and p. 309, *ante*. As to lighting public lamps, see Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), ss. 24—27, and p. 342, *ante*. When these clauses are not applicable the provision in the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 22, requires the gas company well and effectually to light all public lamps in all streets which they are required by the local authority to light, and, according to the terms of their contract, to supply to the local authority so much gas as they require for their public lamps, provided that the gas company shall not be compelled to light any street with lamps at a greater distance from each other than seventy-five yards.

(*t*) As to referees, see p. 388, *post*.

(*a*) This provision occurs in almost identical terms in a special Act of each of three companies, namely, in the Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 84; Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), s. 32; and South Metropolitan Gaslight and Coke Co.'s Act, 1876 (39 & 40 Vict. c. ccxxix.), s. 33.

(*b*) As to general form of such sliding scale, see p. 371, *ante;* and for the particular forms of the various companies, see South Metropolitan Gas Act, 1900 (63 & 64 Vict. c. clxii.), s. 5; Commercial Gas Act, 1902 (2 Edw. 7, c. cxxxiv.), s. 12; Gas Light and Coke Co.'s (Capital Consolidation) Act, 1898 (61 & 62 Vict. c. clxxii.), s. 15; as amended by the Gas Light and Coke Co.'s Act, 1903 (3 Edw. 7, c. xli.), ss. 8, 9. There are various provisions in the special Acts regulating the price to be charged to public authorities. Differences between local authorities and the companies as to the rate to be charged are to be settled by arbitration under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), in the case of the Gas Light and Coke Company and South Metropolitan Gas Company (see Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 27, and compare Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 28), and under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), in the case of the Commercial Gas Company (Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), s. 69). See titles COMPANIES, Vol. V., p. 726; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 78.

(*c*) Metropolis Gas (Prepayment Meter) Act, 1900 (63 & 64 Vict. c. cclxxii.), s. 3. This section is in the form of the model clause; see p. 336, *ante*.

(*d*) Metropolis Gas (Prepayment Meter) Act, 1900 (63 & 64 Vict. c. cclxxii.), s. 4. The above rate is open to revision by the Board of Trade as follows:—

prepayment meter, without fittings, is at the rate of 10 per cent. per annum on the cost of the meter to the companies respectively, and the Acts of the respective companies in regard to ordinary meters apply, so far as applicable, within the companies' respective districts, to prepayment meters (*e*). A company in collecting money for gas supplied by means of a prepayment meter is required to give a receipt for the same in a form which will show clearly the rate per 1,000 cubic feet charged for gas, and in addition the rate in respect of meters and their fittings charged therewith (*f*).

Recovery of charges.

776. The recovery of gas rents and charges and meter rents is governed by the Gasworks Clauses Act, 1847 (*g*), and in the case of the Gas Light and Coke Company and South Metropolitan Gas Company by the Gasworks Clauses Act, 1871 (*h*). There are also provisions in the special Acts of the companies relating to such recovery (*i*).

SECT. 5.—*Pressure, Illuminating Power, and Purity.*

SUB-SECT. 1.—*The Prescribed Standards.*

Pressure.

777. The pressure at which gas must be supplied by the companies, except in the case of accident or repairs, is prescribed in the special Acts of each gas company (*k*), and, unless prevented by necessary repairs or unavoidable accident, it must at all times keep all its branch or service pipes fully charged with gas, and the

If at any time after the expiration of seven years from the 6th August, 1900, or from the date of any inquiry under this provision, any of the companies or the London County Council, or the City Corporation, request the Board of Trade in writing to revise the said rate, the Board of Trade must appoint a competent and impartial arbitrator, who shall hold an inquiry and fix a maximum rate to be substituted for the rate aforesaid, and the Board of Trade may at any time do so, if they think fit, at such request. At least twenty-eight days before holding any such inquiry the Board of Trade must give to each of the companies, to the council, and to the corporation notice of such inquiry, and of the time and place thereof, and each of the companies, the council, and the corporation are to be entitled to attend and be heard at such inquiry (Metropolis Gas (Prepayment Meter) Act, 1900 (63 & 64 Vict. c. cclxxii.), s. 5).

(*e*) *Ibid.*, s. 7.

(*f*) *Ibid.*, s. 6.

(*g*) 10 & 11 Vict. c. 15, ss. 15, 16; and see p. 339, *ante*.

(*h*) 34 & 35 Vict. c. 41, ss. 39—41; and see p. 339, *ante*. The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 39, provides that an incoming tenant is not required to pay the arrears of an outgoing tenant unless the incoming tenant has agreed to do so with the defaulting consumer, and is in very similar terms to the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 39. There is also a similar provision in the Gaslight and Coke Co.'s Act, 1870 (33 & 34 Vict. c. cxxi.), s. 15, and again, somewhat modified, in the Gaslight and Coke Co.'s Act, 1871 (34 & 35 Vict. c. lxxv.), s. 18.

(*i*) See Gaslight and Coke Co.'s Act, 1871 (34 & 35 Vict. c. lxxv.), ss. 70, 71; Gaslight and Coke Co.'s Act, 1872 (35 & 36 Vict. c. xxiii.), s. 17; South Metropolitan Gaslight and Coke Co.'s Act, 1869 (32 & 33 Vict. c. cxxx.), ss. 80, 81; Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), ss. 85, 86; Commercial Gas Act, 1902 (2 Edw. 7, c. cxxxiv.), s. 4.

(*k*) It is the same for each company, namely, at such pressure as to balance from midnight to sunset a column of water not less than six-tenths of an inch in height, and from sunset to midnight a column of water not less than one inch in height; see Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), s. 26; South Metropolitan Gaslight and Coke Co.'s Act, 1876 (39 & 40 Vict. c. ccxxix.), s. 27; Commercial Gas Act, 1875 (38 & 39 Vict.

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stopcocks so turned as not to prevent the branch or service pipes from being at all times filled with gas (*l*).

Illuminating power.

The illuminating power of the gas supplied, when burned in the prescribed manner, is to be equal to the light of fourteen prescribed candles in the case of the Gas Light and Coke Company, the South Metropolitan Gas Company, and the Commercial Gas Company (*m*).

Purity.

The gas supplied must not exhibit any trace of sulphuretted hydrogen when tested in the prescribed manner (*n*), but no company is liable to any forfeiture by reason of the presence in the gas supplied by the company of sulphur impurities other than sulphuretted hydrogen (*o*).

SUB-SECT. 2.—*Gas Referees.*

Appointment of gas referees.

778. The Board of Trade have been at various times required in respect of each company to appoint three competent and impartial persons, one at least of them having practical knowledge and experience in the manufacture and supply of gas, who were to be called the gas referees, and in the case of a vacancy happening among them by death, resignation, or otherwise the Board must appoint a competent and impartial person to fill the vacancy, one at least of the three being always qualified as aforesaid. Every person appointed to be one of the gas referees continues in office for one year only from the date of his appointment, but is capable of reappointment. Two of the gas referees form a quorum, and at least two of the referees must concur in every act or determination of the referees (*p*).

Duties of referees.

779. The gas referees are required from time to time to prescribe and certify the mode to be adopted for testing and recording the pressure at which the gas is supplied by the company (*q*). They

c. cc.), s. 71. All gas must be supplied at the above pressures in the case of the Gas Light and Coke Company and the South Metropolitan Gas Company, but the provision is limited to private consumers in the case of the Commercial Gas Company.

(*l*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 24.

(*m*) The gas is to be consumed at the rate of five cubic feet an hour in the burner prescribed by the gas referees; see p. 389, *post*. The candles are to be sperm candles of six to the pound, each consuming 120 grains an hour (London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 4, amended as to the Gas Light and Coke Company, by the Gas Light and Coke Co.'s Act, 1909 (9 Edw. 7, c. lxxxvii.), s. 38. This Act also contained a provision fixing the calorific power of the gas supplied (*ibid.*, ss. 39—43)).

(*n*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 6. As to the prescribed manner, see p. 389, *post*.

(*o*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 7. As to testing for such other impurities, see *ibid.*, s. 5, and p. 391, *post*.

(*p*) These provisions are contained in the special Acts of the companies. As to the Gas Light and Coke Company, see City of London Gas Act, 1868 (31 & 32 Vict. c. cxxv.), ss. 29—32, as extended by the Gaslight and Coke Co.'s Act, 1868 (31 & 32 Vict. c. cvi.), s. 109. As to the South Metropolitan Gas Company, see South Metropolitan Gaslight and Coke Co.'s Act, 1869 (32 & 33 Vict c. cxxx.), ss. 15—18, and as regards the Commercial Gas Company, see Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), ss. 22—26. The first appointments were required to be made in each case within a few months of the passing of the particular Act.

(*q*) The Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 6. This Act is amended by the London Gas Act, 1905 (5 Edw. 7, c. clv.), and the two Acts are to be read and construed together

SECT. 5. Pressure, Illuminating Power, and Purity.

are also required from time to time to prescribe and certify the situation and number of the testing places and the apparatus and materials therein for testing the illuminating power and purity of the gas to be provided by the company, and the company must provide and maintain such testing places, apparatus, and materials accordingly, and the same are to be under the control and management of the London County Council, or, in the City, of the Common Council, who are referred to as the controlling authority (*r*). The gas referees must also from time to time prescribe the burner for testing the illuminating power of the gas supplied and the chimney, if any, to be used with such burner (*s*). The mode prescribed and certified for testing and recording the presence of sulphuretted hydrogen must not be more stringent than that prescribed in the Gasworks Clauses Act, 1871 (*t*), and the gas referees may not prescribe or certify the amount of sulphur impurities, other than sulphuretted hydrogen, with which the gas supplied shall be allowed to be charged (*a*).

Controlling authority.

They are also empowered from time to time to prescribe the places and manner for testing the gas supplied for the purpose of

as one Act (London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 2). The earlier Act is referred to in the later Act as the Act of 1880.

(*r*) This provision occurs in almost identical terms in the respective special Acts of the three companies. In the case of the Gas Light and Coke Company one at least of the testing places must be in the City of London, and one or more outside the City. Each company may have a separate testing place, which will be under their own control and management, in the same building as the place they provide. For these provisions, see Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), ss. 34—36; South Metropolitan Gaslight and Coke Co.'s Act, 1876 (39 & 40 Vict. c. ccxxix.), ss. 35—37; Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), ss. 32, 33. The companies are required to connect each testing place with such main or mains as may be prescribed by the gas referees, by means of one service pipe only, which shall proceed direct from the main into the testing place, and there shall be no pipe, branch, or tap in any way connected with such service pipe outside the testing place, except that the company may provide a tap on the service pipe at a point outside and as near as practicable to the testing place, for use in case of emergency only, and such tap must be sealed by and on behalf of the controlling authority as occasion may require in such manner that the tap cannot be used or turned without breaking the seal. The company must give the controlling authority and persons authorised by them access at all reasonable times to such tap, and in the event of the same having been used or turned must forthwith notify the fact to the gas referees and to the controlling authority (London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 8). For the definition of "controlling authority," see Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 2: by the same section "the corporation" is defined as meaning "the mayor, aldermen, and commons of the City of London, in common council assembled."

(*s*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 3, which also provides that the burner to be prescribed by the gas referees must be of such a pattern (not being an incandescent or similar burner) as shall be practicable for use by the consumer, and the burner and chimney, if any, is to be the most suitable for obtaining, and in making the test is to be so used as to obtain, from the gas when consumed at the rate of 5 cubic feet an hour the greatest amount of light. The referees under this section have prescribed the London Argand No. 2 burner.

(*t*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 6; and see Sched. A, Part II., of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), and p. 353, *ante*, and as to corrections to be made under the special Act, see note (*c*), *ibid.*

(*a*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 7. As to testing for purity, compare p. 393, *post*.

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ascertaining the calorific power, the purity as regards sulphur other than sulphuretted hydrogen, and the illuminating power (*b*). The company must also provide and maintain at any place such apparatus and materials as the gas referees may from time to time prescribe for the purposes of this provision (*c*).

A copy of each certificate of the gas referees must be sent to the controlling authority and to the company (*d*). The gas referees are required from time to time, after giving notice to the controlling authority, to visit the testing places and examine the apparatus for the purpose of ascertaining that it is kept in good and proper repair and working order (*e*).

Appeal against prescription.

If the company think themselves aggrieved by any prescription or certificate of the gas referees, they may, in the case of an appeal in respect of a burner or a chimney prescribed by the gas referees within three months, or in any other case within one month, from the making of such prescription or certificate, appeal against such prescription or certificate to the chief gas examiner (*f*), who, after hearing the company and the gas referees and any other body or person whom he shall think fit, may confirm, amend, vary, or annul such prescription or certificate, and his decision is to be final and conclusive. Any prescription or certificate as so confirmed, amended, or varied is to be deemed the prescription or certificate of the gas referees in the matter or matters to which it relates (*g*).

Penalty for non-compliance with prescription.

If the company neglects or refuses to comply with any lawful prescription or certificate of the gas referees, or to provide or maintain any testing place, apparatus, or materials, or any other matter or thing prescribed or certified therein, it is liable on summary conviction to a penalty not exceeding £50 for each day during which such refusal continues, but no proceedings may be taken under this provision unless the Board of Trade consent thereto after giving the company an opportunity of being heard, and until after the expiration of the period above mentioned within which the company may appeal against the prescription or certificate, or if the company has appealed, unless or until either such appeal is withdrawn or the chief gas examiner has given his decision thereon (*h*).

SUB-SECT. 3.—*Gas Examiners.*

Appointment.

780. Within the City of London the Corporation, and elsewhere in the metropolis the London County Council, as successors of the Metropolitan Board of Works, must respectively appoint and always keep appointed a competent and impartial person or persons to be a gas examiner or gas examiners for the several testing places within their respective jurisdictions. A chief gas examiner, being a competent and impartial person, is also to be

Chief gas examiner.

(*b*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 5 (1).
(*c*) *Ibid.*, s. 5 (4).
(*d*) See note (*p*), p. 388, and note (*r*), p. 389, *ante*, and note (*k*), p. 391, *post*.
(*e*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 5.
(*f*) As to the appointment of the chief gas examiner, see *infra*.
(*g*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 9.
(*h*) *Ibid.*, s. 15, which also provides that the above remedy is in addition to and not in derogation of any existing remedy.

appointed from time to time and to be removable by the Board of Trade (*i*).

SECT. 5. Pressure, Illuminating Power, and Purity.

781. A gas examiner is required in the prescribed mode to test the pressure at which gas is supplied at such hour and in such street or part of a street as the controlling authority may from time to time by an order in writing appoint, and within three days of the receipt of such order (*j*). He must also make daily, except on Sundays, such number of tests as the gas referees may prescribe for ascertaining whether, during the whole of such day, the illuminating power and purity of the gas supplied at such testing place by the company are such as are respectively prescribed; but the test for illuminating power must be taken at intervals of not less than one hour. In the event of the gas being ascertained to be defective in any such particular, the examiner must forthwith give notice thereof to the company (*k*). The company may, if it thinks fit, on each occasion of the testing at any testing place of the illuminating power, purity, and pressure of the gas supplied by them, be represented by some officer, but such officer may not interfere in the testing, and the controlling authority are required to state at what times it is proposed to make such testings on any particular day upon receiving a request in writing from the company in the forenoon of the previous day (*l*).

Duties of gas examiners.

782. The average of all the testings at any testing place on each day of the illuminating power, or of the purity respectively, of the gas supplied by the company at such testing place is deemed to represent the illuminating power or the purity, as the case may be, of such gas on that day at such testing place, provided that if on any one day the gas supplied by the company at such place be of less illuminating power to an extent not exceeding one candle than it ought to be, or of less purity than it ought to be respectively, the average of all the respective testings made at such

Average of testings.

(*i*) These provisions are in the special Acts of the respective companies, and are practically identical; see Gaslight and Coke Co. Act, 1876 (39 & 40 Vict. c. ccxxv.), ss. 38, 39; South Metropolitan Gaslight and Coke Co.'s Act, 1876 (39 & 40 Vict. c. ccxxix.), ss. 39, 40; Commercial Gas Act, 1875 (38 & 39 Vict. c. cc.), ss. 35, 36; and compare Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41).

(*j*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 6.

(*k*) *Ibid.*, s. 7; as amended by the London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 10. It was decided that the word "daily" in the section of the first-mentioned Act included Sundays (*London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A.; for other definitions of such words, see title TIME). The London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 10, provides that notwithstanding anything in the Act of 1880 (see note (*q*), p. 388, *ante*) or any other Act, it shall not be obligatory on the controlling authority to make on Sunday any testings of the gas supplied by the company. There is also a provision that when such testings are not so made, Saturday and the following Monday shall be treated as consecutive days. As the examiners are appointed by the controlling authority, the expression "controlling authority" was evidently used to include their examiners; see *London County Council* v. *South Metropolitan Gas Co.*, *supra*, at pp. 85, 86.

(*l*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 10. Where there are no Sunday testings, Saturday is the previous day to Monday (London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 10).

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testing place on that day and on the preceding day and on the following day is to be deemed to represent the illuminating power or the purity, as the case may be, of the gas on such day at such testing place (*m*).

Daily reports.

783. Each gas examiner must on each day make and deliver a report of the result of the testings of the gas supplied by the company conducted by him on the immediately preceding day (*n*) to the controlling authority, to the gas referees, to the chief gas examiner, and to the company, and the books kept by a gas examiner for recording the results of the testing of such gas by him must be open at all reasonable times to the inspection of the company without payment (*o*).

Appeal to chief gas examiner.

784. If the company thinks itself aggrieved by any report of a gas examiner it may, within seven days after the day on which that report is delivered to the company, appeal to the chief gas examiner, who may confirm, amend, vary, or annul such report (*p*). His decision, after hearing the parties, or without hearing them on their failure or neglect to attend before him after receiving not less than seven days' notice of the time and place fixed by him for hearing such matter (*q*), is final and conclusive, and he must forthwith report every such decision to the controlling authority (*r*) and to the company. If in any case the company does not so appeal, or if it appeals and withdraws the appeal, the report of the gas examiner is final and conclusive (*s*).

Quarterly report of chief examiner.

785. The chief gas examiner is required to make a report to the controlling authority and to the company within one week of each quarter of a year on the result of the daily testings made in that quarter, and to state therein the illuminating power on each day at each testing place, the amount of impurity on each day at each testing place (*t*), and the results of each testing of pressure (*u*).

Testings as to calorific power etc.

786. In addition to the daily testings above mentioned, each gas examiner must make at any of the places prescribed by the

(*m*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), ss. 8, 9, as amended by the London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 4 (3)

(*n*) Saturday is to be deemed the day preceding Monday (London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 10; and see notes (*k*) and (*l*), p. 391, *ante*.

(*o*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 11.

(*p*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 11.

(*q*) *Ibid.*, s. 13. He has a discretion as to whether or not he will hear counsel (*R.* v. *Williamson* (1890), 59 L. J. (Q. B.) 493). If he decide without giving notice, his decision may be quashed by *certiorari* (*R.* v. *London County Council, Ex parte Commercial Gas Co.* (1895), 11 T. L. R. 337).

(*r*) As to the controlling authority, see p. 389, *ante*.

(*s*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 11, which also provides that the company on appealing, or on withdrawing an appeal, must forthwith give notice of such appeal or withdrawal, as the case may be, to the controlling authority.

(*t*) As to testing for impurities other than sulphuretted hydrogen, see London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 5, and p. 393, *post*; and compare p. 389, *ante*. Since that Act came into operation, there is no compulsory daily testing for such other impurities.

(*u*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 13.

gas referees, on such days (exclusive of Sundays) as the controlling authority direct, and in the manner for the time being prescribed by the gas referees, testings of the gas supplied by the company for the purpose of ascertaining the calorific power, the purity as regards sulphur other than sulphuretted hydrogen, and the illuminating power as ascertained by means of a flat flame burner for the time being prescribed by the referees (*a*). Each gas examiner must forthwith deliver to the controlling authority, to the gas referees, to the chief gas examiner, and to the company a report of the result of each testing so conducted by him, but the company is not liable to forfeitures in respect of any such testings (*b*).

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SUB-SECT. 4.—*Penalties.*

787. The company is liable to forfeit for defective illuminating power in respect of gas supplied on any day at any testing place for the first half of a candle of defective power 40*s.*, and for the first and every subsequent candle of defective power a sum not less than £25 and not exceeding £100, having regard to the relative quantities of gas manufactured by the respective companies (*c*); and for defective purity in respect of gas supplied by the company on any day at any testing place a sum not exceeding £50 for each occasion on which it is so in default (*d*). But if the controlling authority of any testing place have recovered one forfeiture in respect of illuminating power, or in respect of purity respectively, in the gas supplied by the company at one testing place on any day, they are not entitled to any further forfeiture in respect of defective illuminating power or excess of impurity, as the case may be, in the gas supplied by the company at any other testing place of such controlling authority on the same day (*e*). For defective pressure at any time during twenty-four hours from midnight to midnight the company is liable to forfeit a sum not exceeding £10, but if the controlling authority have recovered one forfeiture in respect of insufficiency in the gas supplied by the company during any period of twenty-four hours, they are not entitled to any further forfeiture in respect of insufficiency of pressure in respect of the gas supplied by the company during the same period (*f*).

Defective power.

Impurities.

Defective pressure.

788. No forfeiture is to be incurred in any case with respect to which it is certified by the chief gas examiner that the defect of illuminating power, excess of impurity, or insufficiency of pressure was occasioned by an unavoidable cause or accident (*g*).

Unavoidable cause.

(*a*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 5 (1), (5). The company must give the gas examiner access to any testing place, and afford him all facilities for the proper execution of his duties under this section (*ibid.*, s. 5 (4)). As to such prescription, see p. 389, *ante*.

(*b*) London Gas Act, 1905 (5 Edw. 7. c. clv.), s. 5 (2), (3). As to forfeitures, see p. 394, *post*.

(*c*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 14.

(*d*) *Ibid.*, s. 15. The company are not liable to any forfeiture for impurities other than sulphuretted hydrogen (London Gas Act, 1905 (5 Edw. 7, c. clv.), ss. 5, 7).

(*e*) Gaslight and Coke and other Gas Companies Act Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), ss. 14, 15.

(*f*) *Ibid.*, s. 16.

(*g*) *Ibid.*, s. 17.

SECT. 5. **Pressure, Illuminating Power, and Purity.**

Recovery of forfeitures.

789. These forfeitures are recoverable on summary conviction before a magistrate, or in the City before a justice of the peace, and every order or conviction in respect of any such penalty is subject to the like appeal and upon the same terms as is provided in the Metropolitan Police Courts Act, 1839 (*h*), in respect of any order or conviction of any magistrate (*i*). But if the chief gas examiner, in giving his decision upon any appeal made to him by the company against the report of a gas examiner, certifies that the default of the company is not substantial, or is not due to the careless conduct of the company or its servants, then proceedings must not be taken before a petty sessional court for the determination of the amount of the forfeiture to be paid by the company in respect of such default. In that case, however, the chief gas examiner, if requested to do so by the controlling authority, at the time of hearing such appeal or giving his decision thereon, or at any time within six months after the date of his decision, may, after hearing the council and the company, determine the amount of the forfeiture to be paid by the company in respect of such default, but in so determining it he must act subject to the provisions already stated in respect of forfeiture for defective illuminating power (*k*). The amount so fixed may be recovered summarily as a civil debt (*l*).

Time for and evidence at proceedings.

790. Proceedings for forfeitures may be commenced at any time within six months after the date of the report of the gas examiner or after the date of the report of the chief gas examiner on appeal, or in the event of the company appealing and withdrawing the appeal, within six months from the date of the receipt of the notice of such withdrawal (*m*). The report of a gas examiner (in cases where there is no report of the chief gas examiner) showing a case of defective illuminating power, excessive impurity in or insufficient pressure of the gas supplied by the company, or, in cases where there is a report of the chief gas examiner showing such a case as aforesaid, such last-mentioned report, is conclusive evidence of the liability of the company to a forfeiture in respect thereof (*n*).

(*h*) 2 & 3 Vict. c. 71.

(*i*) Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 20, applying the provisions of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 46, 47, 53, which also provide for the application and appropriation of these fines. They are payable to the Receiver of the Metropolitan Police District (see p. 374, *ante*), or in the City of London are applied in aid of the expenses of the City police. As to orders of magistrates, generally, see title MAGISTRATES.

(*k*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 12. As to forfeiture for defective illuminating power, see Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 14, and p. 393, *ante*.

(*l*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 12. It is also to be appropriated in the same manner as if the amount of such forfeiture had been fixed by a petty sessional court (*ibid.*). Forfeitures are to be paid out of the divisible profits of the company, and by way of reduction of dividend (Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 19).

(*m*) London Gas Act, 1905 (5 Edw. 7, c. clv.), s. 16. Any notice required to be given may be served by post (*ibid.*, s. 18).

(*n*) *Ibid.*, s. 14. Any report or certificate of the chief gas examiner purporting to have been signed by him is for all purposes and to all intents to be *primâ facie* evidence of the due making and signing thereof without proof of such signature (*ibid.*, s. 17). As to proof of documents, generally, see title EVIDENCE, Vol. XIII., pp. 510 *et seq.*

GAS EXAMINERS.

See GAS.

GAS REFEREES.

See GAS.

GAVELKIND.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

GAZETTE (LONDON).

See EVIDENCE.

GENERAL AVERAGE.

See SHIPPING AND NAVIGATION.

GENERAL COUNCIL OF THE BAR.

See BARRISTERS.

GENERAL DISTRICT RATE.

See RATES AND RATING.

GENERAL WORDS.

See REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

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GIFTS

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Part I.—Kinds of Gifts and Definitions.

Kinds of gifts.

791. Gifts may be divided into three classes—namely, (1) gifts *inter vivos*, (2) gifts *mortis causâ*, and (3) gifts by will. The nature and effect of testamentary dispositions do not fall within the scope of this title (*a*).

(*a*) See title WILLS.

A gift *inter vivos* may be defined shortly as the transfer of any property from one person to another gratuitously (*b*). It is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver (*c*). Gifts *inter vivos*.

A post-nuptial settlement is a form of gift, unless made in pursuance of a binding ante-nuptial agreement. Post-nuptial settlement.

A gift *mortis causâ* is one made in contemplation of the death of the donor, and to take effect only in that event; to be recoverable by the donor if that event does not occur, and to be void if the donee dies before it occurs (*d*). Such gift has in effect the nature of a legacy, and is only a gift on survivorship (*e*). Gifts *mortis causâ*.

Part II.—Competency to Give.

SECT. 1.—*Donors sui juris.*

792. *Primâ facie* everyone who is *sui juris* can dispose by way of gift of any property, or of any estate or interest therein, to which he is absolutely entitled. It is on legal and equitable principles clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have and has the power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion, and howsoever circumstanced (*f*). General competency.

793. Husband and wife can make gifts to each other of freeholds and choses in action (*g*); and, since a married woman is Husband and wife.

(*b*) "Gifts then or grants, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent" (2 Bl. Com. 440). As to what is consideration, see title CONTRACT, Vol. VII., pp. 383 *et seq.*

(*c*) Britton (*temp.* Edward I.), Translation by Nichols, Vol. I., p. 220. Gift is a more general term than feoffment, for gift is applicable to all things movable and immovable, and feoffment only to land (*ibid.*, p. 221).

(*d*) *Tate* v. *Hilbert* (1793), 2 Ves. 111, 119, where the first two definitions given by Swinburne, Treatise of Wills, p. 22, were held to be incorrect, and Lord LOUGHBOROUGH, C., adopted the definition of Justinian, Institutes, Lib. ii., tit. vii.: "Mortis causâ donatio est, quæ propter mortis fit suspicionem: cum quis ita donat ut, si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset is qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is cui donatum sit"; and see *Hedges* v. *Hedges* (1708), Prec. Ch. 269.

(*e*) *Tate* v. *Hilbert*, *supra*, at p. 120.

(*f*) *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, C. A., *per* KNIGHT BRUCE, L.J., at pp. 187, 188.

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 50. A conveyance by husband to wife was formerly void in law (*Moyse* v. *Gyles*

SECT. 1. Donors sui juris.

now capable of acquiring, holding, and disposing of any real or personal property as if she were a *feme sole* (*h*), it is submitted that leaseholds and chattels may now be assigned by way of gift by husband or wife to each other (*i*). But the question whether the legal unity of person of the husband and wife has been severed to this extent by the Married Women's Property Act, 1882, is not yet judicially settled (*k*); and it is still desirable to effect gifts of this nature from a husband to his wife by means of a declaration of trust (*l*).

Wife to husband.

Where a wife is not protected by a restraint upon anticipation she can give her separate property (including property settled to her separate use) to her husband, as if she were a *feme sole* (*m*).

Presumption of gift of wife's income to husband.

A wife may make a gift of her separate income to her husband, and the gift may be inferred from the circumstances of the case or the conduct of the spouses. The receipt by her husband of such income with her acquiescence, when they are living together, is a strong presumption of gift (*n*). There is no presumption, however, of a gift of the wife's capital. *Primâ facie* a husband who takes his wife's separate property is a trustee of it for her (*o*), and the burden of proving a gift lies upon him (*p*).

It seems that if a wife gives away the goods of her husband, this is a good gift until he disagrees, and if he agrees it is made indefeasible (*q*).

Aliens.

An alien can dispose of real and personal property of every

(1700), 2 Vern. 385); but in equity it was sometimes supported as a declaration of trust (*Baddeley* v. *Baddeley* (1878), 9 Ch. D. 113; *Fox* v. *Hawks*, *Hawks* v. *Fox* (1879), 13 Ch. D. 822; but see *Price* v. *Price* (1851), 14 Beav. 598; *Re Breton's Estate*, *Breton* v. *Woollven* (1881), 17 Ch. D. 416).

(*h*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.

(*i*) See and consider *Re March*, *Mander* v. *Harris* (1883), 24 Ch. D. 222, 229, 230 (reversed on appeal (1884), 27 Ch. D. 166, C. A., on grounds not affecting the proposition for which it is cited); *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A., and *Lister* v. *Hooson*, [1908] 1 K. B. 174, C. A., where power of husband to make a payment to his wife was not questioned; and see title HUSBAND AND WIFE.

(*k*) See *Butler* v. *Butler* (1885), 14 Q. B. D. 831, 835, 836; affirmed (1885), 16 Q. B. D. 374, C. A.; *Re Jupp*, *Jupp* v. *Buckwell* (1888), 39 Ch. D. 148, 153, where opinions contrary to the opinion of CHITTY, J., in *Re March*, *Mander* v. *Harris*, *supra*, were expressed.

(*l*) "Nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear and distinct act of his, by which he divested himself of his property and engaged to hold it as a trustee for the separate use of his wife" (*M'Lean* v. *Longlands* (1799), 5 Ves. 71, *per* ARDEN, M.R., afterwards Lord ALVANLEY, at p. 79).

(*m*) *Butler* v. *Butler* (1885), 16 Q. B. D. 374, 378, C. A.

(*n*) *Caton* v. *Rideout* (1849), 1 Mac. & G. 599; *Edward* v. *Cheyne* (No. 2) (1888), 13 App. Cas. 385; *Re Flamank*, *Wood* v. *Cock* (1889), 40 Ch. D. 461; *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561, C. A.; *Rowley* v. *Unwin* (1855), 2 K. & J. 138; *Payne* v. *Little* (1858), 26 Beav. 1. The presumption can of course be rebutted by evidence showing that the wife did not make any such gift (see *Parker* v. *Brooke* (1804), 9 Ves. 583; *Dixon* v. *Dixon* (1878), 9 Ch. D. 587); and see title HUSBAND AND WIFE.

(*o*) *Wassell* v. *Leggatt*, [1896] 1 Ch. 554, *per* ROMER, J., at p. 556; *Rich* v. *Cockell*, *Rich* v. *Hull* (1804), 9 Ves. 369.

(*p*) *Re Flamank*, *Wood* v. *Cock*, *supra*.

(*q*) Shep. Touch. (Ed. Preston), p. 243.

description in the same manner as natural-born British subjects can (*r*).

Limited companies.

794. A limited company frequently takes power by its memorandum of association to benefit gratuitously the employees of the company (*a*) and their relatives, and to subscribe to charitable objects; and, without express power, a company, incorporated by special Act of Parliament or under the Companies Acts (*b*), can give gratuities when to do so tends to the prosperity of the company's business. These gratuities may take the form of presents to the employees (*c*), or pensions for the benefit of the family of a deceased servant of the company (*d*), or, in the case of an insurance company, of payment for a loss not directly covered by the policy (*e*). This power does not extend in all circumstances to a company in liquidation, as the gratuities cannot in such case tend to the prosperity of the company's business (*f*). But if the creditors are all paid and every member of the company is *sui juris* and agrees to the gratuity, it can be given; for in that case it is not the gift of the company, but of all the members of it. But a company, without express power, cannot subscribe to objects, however useful, unless they tend to benefit the company (*g*), and cannot forego moneys owing to it, where this would prejudice others to whom it has to account (*h*).

In an agreement for the amalgamation of two companies, it may be agreed that part of the purchase-money be paid to the directors of the selling company by way of compensation for loss of their offices (*i*).

Arrears of directors' salaries.

Directors who have, without consideration, foregone their salaries when the funds of the company were insufficient for its needs, can

(*r*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2. See title ALIENS, Vol. I., p. 309.

(*a*) See *Cyclists' Touring Club* v. *Hopkinson*, [1910] 1 Ch. 179, where the grant of a pension to a former secretary was upheld.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), consolidating previous legislation.

(*c*) *Hampson* v. *Price's Patent Candle Co.* (1876), 45 L. J. (CH.) 437; a power to grant pensions to persons in the employment of the company does not authorise pensions to directors (*Normandy* v. *Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84).

(*d*) *Henderson* v. *Bank of Australasia* (1888), 40 Ch. D. 170.

(*e*) *Taunton* v. *Royal Insurance Co.* (1864), 2 Hem. & M. 135.

(*f*) *Hutton* v. *West Cork Rail. Co.* (1883), 23 Ch. D. 654, C. A.; *Stroud* v. *Royal Aquarium and Summer and Winter Garden Society, Ltd.*, [1903] W. N. 146; *Warren* v. *Lambeth Waterworks* (1905), 21 T. L. R. 685, where gratuities to employees out of compensation money paid by the Metropolitan Water Board were held *ultra vires*.

(*g*) *Tomkinson* v. *South-Eastern Rail. Co.* (1887), 35 Ch. D. 675, where the company proposed to subscribe to the Imperial Institute; and see *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H. L. Cas. 331, at p. 348, where Lord CRANWORTH, L.C., says "it must, therefore, be now considered as a well-settled doctrine that a company, incorporated by Act of Parliament for a special purpose, cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear to be"; and see *Small* v. *Smith* (1884), 10 App. Cas. 119.

(*h*) *Southampton Dock Co.* v. *Southampton Harbour and Pier Board* (1872), L. R. 14 Eq. 595; see title COMPANIES, Vol. V., pp. 283 *et seq.*

(*i*) *Kaye* v. *Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.

SECT. 1. Donors sui juris.

subsequently be paid their arrears, though the payment is for past services, and therefore in strictness for no consideration (*k*).

Corporations created by charter.

795. At common law a corporation created by royal charter has *primâ facie* power to deal with its property in the same manner as an ordinary person, but a statutory corporation is the creature of, and derives its powers from, the statute creating it (*l*).

Non-commercial statutory bodies.

Non-commercial statutory bodies, where their funds are in effect trust funds, cannot make presents out of them. For example, the trustees of a parish cannot give a gratuity to their clerk (*m*); a borough council cannot pay out of the rates for a chain and badge for the mayor (*n*); nor, if they are lords of a manor, can they charge the rates with the usual dinners and refreshments for the juries of the manor (*o*); a municipal corporation cannot endow the ministers of certain churches and chapels with fixed stipends (*p*); a vestry incorporated under the Metropolis Management Act, 1855 (*q*), cannot out of the rates or parish funds defray the expenses of the celebration of the opening of a new vestry hall nor of a dinner and ball in connection with it (*r*); a municipal corporation cannot apply part of the rates in celebrating a royal wedding by providing medals and teas for school children (*s*), though a *bonâ fide* addition to the mayor's salary in anticipation of an increased expenditure would be justified (*s*), nor can they subsidise a college in the town (*s*).

SECT. 2.—*Donors not sui juris.*

Infants.

796. Gifts, whether of realty or personalty, made by infants are voidable by them (*a*). Thus, a deed executed by an infant which takes effect by delivery is voidable by him but not void (*b*). And if an infant gives goods, or money, the gift is voidable by him and may be recovered (*c*). For it is one of the essentials of a valid gift that there should be the complete assent of the donor to the transfer of the property given, and an infant is incapable of giving such assent (*d*).

(*k*) *Lambert* v. *Northern Railway of Buenos Ayres Co.* (1869), 18 W. R. 180.

(*l*) *Sutton's Hospital Case* (1612), 10 Co. Rep. 23 a; *Wenlock* (*Baroness*) v. *River Dee Co.* (1883), 36 Ch. D. 675, n., C. A., *per* BOWEN, L.J. An instance of the power of corporations, created by charter, to make gifts, is to be found in the dinners and presents given by the City companies; and see title CORPORATIONS, Vol. VIII., pp. 356 *et seq.*

(*m*) *Ex parte Mellish* (1863), 8 L. T. 47.

(*n*) *A.-G.* v. *Batley Corporation* (1872), 26 L. T. 392.

(*o*) *R.* v. *Bideford Corporation* (1883), 47 J. P. 756.

(*p*) *A.-G.* v. *Aspinall* (1837), 2 My. & Cr. 613.

(*q*) 18 & 19 Vict. c. 120.

(*r*) *A.-G.* v. *Bermondsey Vestry* (1883), 23 Ch. D. 60, C. A.

(*s*) *A.-G.* v. *Cardiff Corporation*, [1894] 2 Ch. 337.

(*a*) Bac. Abr. tit. Infancy and Age, I. (3), 7th ed., p. 367; Perkins, Laws of England, s. 12 (Translation, 1642, p. 6); Shep. Touch., ch. 12, 7th ed. (1820), p. 230; 1 Bl. Com. 465; Co. Litt. 171 b; and see, generally, title INFANTS AND CHILDREN.

(*b*) *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794; *Allen* v. *Allen* (1842), 2 Dr. & War. 307.

(*c*) *Manby* v. *Scott* (1663), 1 Mod. Rep. 124, 137, Ex. Ch.

(*d*) The *dictum* of Lord MANSFIELD, C.J., in *Buckinghamshire* (*Earl*) v. *Drury*

797. Gifts by idiots and lunatics so found, whether of realty or personalty, are absolutely void (*e*); and, even though made during a lucid interval, a gift *inter vivos* by a lunatic so found before a *supersedeas* of the inquisition has been obtained is void (*f*), though a gift by will in similar circumstances would be valid (*g*). Idiots and lunatics.

The judge in lunacy has, however, jurisdiction to make gifts out of the personal estate of a lunatic, and this jurisdiction has been exercised not only by gifts to charitable institutions which the lunatic when sane had supported, but also by completing a gift made in discharge of what the donor, when sane, had regarded as a moral obligation (*h*).

Though a person born dumb, or even deaf and dumb, if he has understanding, can by delivery and making signs etc. make a good gift, one born deaf, dumb, and blind cannot do so (*i*). Deaf, dumb, and blind persons.

A gift by a person in such a state of intoxication as to be *non compos mentis* is void (*k*). Intoxicated persons.

798. An undischarged bankrupt cannot make a gift of any property which is vested in the trustee in his bankruptcy (*l*). Bankrupts.

799. A convict is incapable, while subject to the Forfeiture Act, 1870 (*m*), of alienating or charging any property. But on his ceasing to be subject to the Act, the possession, administration, and management of the property revests in him (*n*). He can dispose of property acquired by him while lawfully at large under a licence (*o*). Convicts.

800. Trustees and persons in a fiduciary position cannot, unless they are authorised to do so, make presents out of the property Persons in fiduciary positions.

(1761), 2 Eden, 60, 72, H.L., that "if an infant pays money with his own hand without a valuable consideration, he cannot get it back" (assuming it to be correctly reported, which has been questioned, see Simpson, Law of Infants, 3rd ed., p. 64), has not been followed. In *Taylor* v. *Johnston* (1882), 19 Ch. D. 603, BACON, V.-C., appears to have held that a gift by an infant of chattels or personal property in his possession, unless made under duress or undue influence, could not be avoided by him, but it is submitted that this decision, being contrary to the law established by the above authorities, cannot be supported. See, generally, title INFANTS AND CHILDREN.

(*e*) Bac. Abr. tit. Idiots and Lunatics, F.; *Beverley's Case* (1603), 4 Co. Rep. 123 b, 126 b; *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475.

(*f*) *Re Walker* (*a Lunatic so Found*), [1905] 1 Ch. 160, C. A.

(*g*) *Ibid.*, at p. 172, where the reason for the distinction between a gift *inter vivos* and by will by a lunatic is explained.

(*h*) *Re Whitaker* (*a Person of Unsound Mind*) (1889), 42 Ch. D. 119, C. A.; and see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*i*) Shep. Touch. (ed. Preston) p. 233.

(*k*) *Cory* v. *Cory* (1747), 1 Ves. Sen 19; *Cooke* v. *Clayworth* (1811), 18 Ves. 12, 16; *Butler* v. *Mulvihill* (1819), 1 Bli. 137, H. L.; *Nagle* v. *Baylor* (1842), 3 Dr. & War. 60; and compare title CONTRACT, Vol. VII., p. 342.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 143 *et seq.*

(*m*) 33 & 34 Vict. c. 23, s. 8. As to when a convict ceases to be subject to the operation of the Act, see *ibid.*, s. 7; and see, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 429 *et seq.*

(*n*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 18.

(*o*) *Ibid.*, s. 30.

SECT. 2. Donors not sui juris.

which they merely hold for others. If they deem it desirable to make voluntary payments, such as subscriptions to local charities, they should apply to the court for directions (*p*).

Tenants for life.

Tenants for life and persons having the powers of a tenant for life can, in connection with a sale or grant for building purposes, or with a building lease for the general benefit of the residents on the settled land or any part thereof, cause any parts of such land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces for the gratuitous use of the public or individuals (*q*).

Part III.—Competency to Receive.

SECT. 1.—*In General.*

Competency to receive necessary to a gift.

801. As there cannot be a gift without a giving and taking, these being the two reciprocal acts which constitute a gift (*r*), so it is necessary that the donee should be competent to receive what is intended to be given. In general all persons, whether *sui juris* or not, are competent to receive gifts; but there are certain exceptions (*s*).

Illegitimate children.

Illegitimate children in existence or *en ventre sa mère* can take, provided that they are sufficiently designated. But future illegitimate children cannot have property given to or settled on them (*t*).

SECT. 2.—*The Public.*

Dedication of highways.

802. Gifts may be made and received for the benefit of the public. A familiar instance is a gift for the purposes of a highway or footway, which is termed a dedication. As a rule this form of gift is evidenced by the owner permitting the public to have the free use of the way for a number of years without impediment (*u*). But, although if dedication is possible it will be assumed, yet it is open to the owner of the soil to show that owing to the condition of the title dedication was not possible: and this rebuts the presumption which results from continued user by the public (*a*). And although dedication is usually proved by user, it is not user but dedication which constitutes the highway (*b*). The dedication must

(*p*) But in *How* v. *Winterton* (*Earl*) (1902), 51 W. R. 262, the court allowed a trustee in his account the amount of a voluntary school rate, on the ground that if no one paid the voluntary rate a board school would be established, and that would cause a heavier rate to be levied compulsorily. As to duties of trustees, generally, see title TRUSTS AND TRUSTEES.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16; compare Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 20—22; and see title SETTLEMENTS. As to open spaces, see title OPEN SPACES AND RECREATION GROUNDS.

(*r*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, 76, C. A.

(*s*) See pp. 405 *et seq.*, *post*.

(*t*) Co. Litt. 3 b; *Hill* v. *Crook* (1873), L. R. 6 H. L. 265; *Crook* v. *Hill* (1876), 3 Ch. D. 773; *Ebbern* v. *Fowler*, [1909] 1 Ch. 578, C. A., overruling *Re Shaw, Robinson* v. *Shaw*, [1894] 2 Ch. 573. See titles INFANTS AND CHILDREN; SETTLEMENTS; WILLS.

(*u*) *Rugby Charity* (*Trustees*) v. *Merryweather* (1790), 11 East, 375, n.; *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397.

(*a*) *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A.

(*b*) *A.-G.* v. *Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647.

be in perpetuity: there is no such thing known to the law as dedication of a way for a term (*c*).

SECT. 3.—*Infants, Trustees, and Others.*

Infants.

803. Infants are capable of receiving property, whether under a will, by grant, or otherwise: but they may avoid the gift on attaining majority (*d*). An infant cannot give a valid receipt for money paid to him in pursuance of an instrument, unless thereby expressly authorised to do so (*e*).

A deed will pass an interest to an infant even when coupled with a liability if it is for his benefit to accept it (*f*). Thus, a transfer to an infant of shares in joint stock companies, which are not fully paid up, is voidable, not void, so that he can affirm the transfer on coming of age (*g*); but if in the interval events occur which make it clearly for his benefit to repudiate it, it will be treated as a nullity (*h*).

Married women.

804. Under the Married Women's Property Act, 1882 (*i*), a married woman is capable of acquiring and holding any real or personal property as her separate property as if she were a *feme sole*.

Trustees.

805. A trustee cannot receive a substantial gift from his *cestui que trust* out of the trust property (*k*).

Officers of friendly and other societies.

An officer or servant of a friendly or industrial and provident society or of a trade union cannot be the nominee of a member under the provisions of the Acts authorising nominations, unless he or she is the husband, wife, father, mother, child, brother, sister, nephew or niece of the nominator (*l*).

A dead person.

806. The representatives of a person dead at the date of the execution of a deed cannot take under it (*m*).

(*c*) *Corsellis* v. *London County Council*, [1907] 1 Ch. 704, 713, following *Hawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848, *per* BYLES, J., at p. 858; see title HIGHWAYS, STREETS, AND BRIDGES.

(*d*) Bac. Abr. tit. Infancy and Age; and see title INFANTS AND CHILDREN.

(*e*) *Re Deneker, Peters* v. *Bancherean*, [1895] W. N. 28; and see *Re Cardross's Settlement* (1878), 7 Ch. D. 728.

(*f*) *Lumsden's Case* (1868), 4 Ch. App. 31.

(*g*) *Ibid.*, explaining *Re Joint Stock Discount Co., Mann's Case* (1867), 3 Ch. App. 459, n.

(*h*) *Re St. George's Steam Packet Co., Litchfield's Case* (1850), 3 De G. & Sm. 141; *Re Electric Telegraph Co. of Ireland, Reid's Case* (1857), 24 Beav. 318; *Curtis's Case* (1868), L. R. 6 Eq. 455; *Capper's Case* (1868), 3 Ch. App. 458; *Lumsden's Case, supra; Symons' Case* (1870), 5 Ch. App. 298.

(*i*) 45 & 46 Vict. c. 75, s. 1 (1); see title HUSBAND AND WIFE.

(*k*) *Vaughton* v. *Noble* (1861), 30 Beav. 34, 39; and see titles FRAUDULENT AND VOIDABLE CONVEYANCES, p. 109, *ante;* TRUSTS AND TRUSTEES.

(*l*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (3); Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1); Trade Union Act, Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 10; and see, generally, titles FRIENDLY SOCIETIES, p. 153, *ante;* INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES; TRADE AND TRADE UNIONS.

(*m*) *Re Tilt, Lampet* v. *Kennedy* (1896), 74 L. T. 163, following *dictum* of HALL, V.-C., in *Re Corbishley's Trusts* (1880), 14 Ch. D. 846.

SECT. 4. Charities. Corporations, Public Bodies etc.

SECT. 4.—*Charities, Corporations, Public Bodies etc.*

Charities.

807. Money, goods, and other personal property (except chattels real) may be given to and validly received by charities: but, with certain exceptions, land, as defined by statute (*n*), cannot be acquired for charitable purposes by gift *inter vivos*, except in accordance with the provisions of the Mortmain and Charitable Uses Act, 1888 (*o*), which apply to assurances of land by deed, in spite of the Mortmain and Charitable Uses Act, 1891 (*p*). There are, however, various exemptions from the provisions of the Act (*q*); and certain charitable and public institutions and bodies are exempted by special Act or charter or by some public Act (*r*).

Corporations.

A gift of land cannot be made to a corporation, as opposed to a joint stock company, without a charter or licence from the Crown, or under the authority of an Act of Parliament; and if it should be so given, it will be forfeited to the Crown, or if held of a mesne lord under the Crown, then to the mesne lord (*s*). Many corporations, however, have authority from the Crown to hold land not exceeding a certain limit (*t*). When that limit is reached, a further licence has to be obtained, if the corporation desires to hold any more land.

County councils.

A county council (*a*), or a metropolitan borough council (*b*), can acquire lands, easements, rights, halls, buildings and offices, and there can be no doubt that the acquisition may be by way of gift. A parish council is expressly authorised to accept and hold any gifts of property, real or personal, for the benefit of the inhabitants of the parish or any part thereof (*c*); a district council is expressly authorised to acquire by way of gift any estate in or rights over a common, regulated under a scheme, for the purposes of the scheme (*d*).

Queen Anne's Bounty.

The Governors of Queen Anne's Bounty can accept gifts for the augmentation of the maintenance of the ministers of the Church of England (*e*). The Ecclesiastical Commissioners for England may

(*n*) See the definition of "land" in the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

(*o*) 51 & 52 Vict. c. 42. As to what are "charities," see the definition, *ibid.*, s. 13 (2), which, however, is not exhaustive; and title CHARITIES, Vol. IV., p. 106.

(*p*) *Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422, C. A.

(*q*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6.

(*r*) As to these and as to this subject generally, see title CHARITIES, Vol. IV., pp. 124 *et seq.*

(*s*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1 (1); and see title CORPORATIONS, Vol. VIII., pp. 367 *et seq.*

(*t*) *E.g.*, the City companies and the Foundling Hospital. In the latter case an Act of Parliament further defines the rights of the Hospital (stat. (1739) 13 Geo. 2, c. 29).

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65; and see, generally, title LOCAL GOVERNMENT.

(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), and Sched. II., Part II.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (h).

(*d*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 7; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 597 *et seq.*

(*e*) Stat. (1703) 2 & 3 Ann. c. 20, ss. 4, 5.

likewise accept gifts for certain purposes (*f*). The minister and churchwardens of a parish can accept gifts for school sites (*g*).

Gifts of land not exceeding one acre for the enlargement of churchyards or burial places in England or Wales may be made to the person or corporation in whom the churchyard or burial place is vested, and the donor may reserve the exclusive right in perpetuity of burial and of placing monuments and gravestones in a part of the land so added not exceeding one sixth of the whole (*h*). Gifts for ecclesiastical purposes etc.

Part IV.—Gifts Inter Vivos.

SECT. 1.—*Gifts, Subjects of.*

SUB-SECT. 1.—*Real Estate.*

808. Land and any estate or interest therein and any hereditaments, corporeal or incorporeal, may be the subject of gift. Gifts of land are usually termed voluntary conveyances. All voluntary conveyances of land or any interest therein, except conveyances in favour of a charity (*i*), were formerly held void as against purchasers for value or mortgagees from the grantor (*j*); but this is no longer so, and no voluntary conveyance made *bonâ fide* and without fraudulent intent, and without reserving a power of revocation to the grantor at his pleasure, can now be defeated by any subsequent disposition by the grantor (*k*). Land. Voluntary conveyances.

A deed of gift of land passes all the buildings on it, and the rights enjoyed with it (*l*), but not the tithes nor tithe rentcharges (*m*). If it is intended to present the tithe rentcharge to the owner of the land on which it is charged, so that it may merge, this can be carried into effect by a deed or declaration to be confirmed by the Board of Agriculture and Fisheries (*n*). Gift of land. Tithe rentcharge.

809. A gift of a right of patronage of a benefice is not valid unless (1) it is properly registered, (2) it transfers the whole Advowsons.

(*f*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 22, as explained by New Parishes Act, 1844 (7 & 8 Vict. c. 94), s. 7; District Church Tithes Act, 1865 (28 & 29 Vict. c. 42), s. 7; and see title ECCLESIASTICAL LAW, Vol. XI., p. 773.

(*g*) School Sites Acts, 1841 (4 & 5 Vict. c. 38), s. 7, and 1844 (7 & 8 Vict. c. 37), s. 4; and see, generally, title EDUCATION, Vol. XII., pp. 118 *et seq.*

(*h*) Consecration of Churchyards Act, 1868 (31 & 32 Vict. c. 47); and see title BURIAL AND CREMATION, Vol. III., pp. 434, 435, 441 *et seq.*

(*i*) *Ramsay* v. *Gilchrist*, [1892] A. C. 412, P. C.

(*j*) Stat. (1584-5) 27 Eliz. c. 4. The Act only refers to conveyances intended to be fraudulent and covinous, but all voluntary conveyances were held by the court to be *primâ facie* fraudulent; voluntary settlements of personal estate (except leaseholds to which no liability is attached) are not within the Act (*Jones* v. *Croucher* (1822), 1 Sim. & St. 315); see title FRAUDULENT AND VOIDABLE CONVEYANCES, p. 96, *ante*.

(*k*) Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21). The Act applies to conveyances made either before or after it was passed, unless the land has previously been disposed of in favour of a purchaser for value; see title FRAUDULENT AND VOIDABLE CONVEYANCES, p. 93, *ante*.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6; and see, generally, title REAL PROPERTY AND CHATTELS REAL.

(*m*) *Chapman* v. *Gatcombe* (1836), 2 Bing. (N. C.) 516.

(*n*) Tithe Acts, 1836 (6 & 7 Will. 4, c. 71), s. 71, 1838 (1 & 2 Vict. c. 64), 1839 (2 & 3 Vict. c. 62), s. 6, 1842 (5 & 6 Vict. c. 54), s. 20, and 1846 (9 & 10 Vict.

SECT. 1. Gifts, Subjects of.

interest of the donor, and (3) more than a year has elapsed since the last admission, but in a family settlement a life interest may be reserved to the settlor (*o*).

Any agreement for any exercise of a right of patronage in favour of or on the nomination of another or for the retransfer of the right or for the resignation of a benefice in favour of any person is invalid (*p*).

National grants.

810. In several cases in which real estate has been granted to persons for distinguished services performed and to support dignities then created, the legislature has attached conditions preventing or affecting the alienation of the fee simple (*q*). In such cases alienation of the rents and profits during the life of the holder of the dignity is not prohibited (*r*). But hereditaments the reversion to which is in the Crown, if given by the Crown by way of reward for services, are inalienable (*s*), though if given out of affection they may be alienated as if given out of affection by a private person (*t*).

SUB-SECT. 2.—*Chattels.*

Gifts of chattels.

811. All chattels may be the subject of gift; but at law only an absolute interest in them can be given *inter vivos*, and a grant of chattels for life vests the whole legal interest in the grantee to whom they are given for life. Through the medium of trusts limited interests can be created in any chattels, except to things *quæ ipso usu consumuntur*, which, unless they consist of farming stock, or stock-in-trade of a business (*a*), cannot be given for less than an absolute interest.

By bill of sale.

A complete gift of chattels, where the possession remains with the donor, must be effected by a bill of sale duly attested and registered under the Bills of Sale Act, 1878 (*b*).

c. 73), s. 19; for a form of declaration, see Encyclopædia of Forms and Precedents, Vol. XIV., p. 374; and see title ECCLESIASTICAL LAW, Vol. XI., p. 751.

(*o*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 582 *et seq.*

(*p*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1.

(*q*) See, *e.g.*, the cases of *The Duke of Marlborough*, stat. (1706), 6 Ann. c. 6, s. 5; *The Duke of Wellington*, stat. (1814) 54 Geo. 3, c. 161, s. 8; *The Earl of Shrewsbury*, Private Act (1719) 6 Geo. 1, c. 29; *Shrewsbury* (*Earl*) v. *Scott* (1859), 6 C. B. (N. S.) 1; *Howard* v. *Shrewsbury* (*Earl*) (1867), 2 Ch. App. 760; *The Earl of Abergavenny*, Unprinted Private Act (1555) 2 & 3 Ph. & M. c. 23; *Abergavenny* (*Earl*) v. *Brace* (1872), L. R. 7 Exch. 145; and *The Bolton Estates*, Private Act (1535-6) 27 Hen. 8, c. 16; *Re Bolton Estates*, *Russell* v. *Meyrick*, [1903] 2 Ch. 461, C. A. As to estate in fee simple, generally, see title REAL PROPERTY AND CHATTELS REAL.

(*r*) *Davis* v. *Marlborough* (*Duke*) (1818), 1 Swan. 74.

(*s*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 18; *Perkins* d. *Vowe* v. *Sewell* (1768), 1 Wm. Bl. 654; compare *Chesterfield's* (*Earl*) *Case* (1665), Hard. 409; *Robinson* v. *Gifford*, [1903] 1 Ch. 865. Such estates can be dealt with under the Settled Land Acts (see Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 58), unless the land was purchased with money provided by Parliament in consideration of public services (*ibid.*).

(*t*) *Grafton* (*Duke*) v. *London and Birmingham Rail. Co.* (1838), 5 Bing. (N. C.) 27; *A.-G.* v. *Richmond* (*Duke*) (No. 2), [1907] 2 K. B. 940.

(*a*) *Groves* v. *Wright* (1856), 2 K. & J. 347; *Myers* v. *Washbrook*, [1901] 1 K. B. 360; compare *Breton* v. *Mockett* (1878), 9 Ch. D. 95.

(*b*) 41 & 42 Vict. c. 31, s. 8. This Act still regulates bills of sale by way of absolute transfer, notwithstanding the repeal of s. 8 (*ibid.*) contained in the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 15; see *Swift* v. *Pannell* (1883), 24 Ch. D, 210, and title BILLS OF SALE, Vol. III., p. 5.

Animals *feræ naturæ*, while unreclaimed, cannot be the subject of a gift (*c*). Wild animals.

There is no property in a dead body, so that a man cannot by will or any other instrument dispose of his own body, nor can he dispose of the body of anyone else (*d*). Dead bodies.

SUB-SECT. 3.—*Choses in Action.*

812. With certain exceptions all choses in action are assignable, and may be the subjects of gift (*e*). Choses in action

A mere expectancy, however, such as a *spes successionis* to property, as the possible heir or one of the possible next of kin of a living person is not a title to property by English law (*f*); and a voluntary assignment of such an expectancy, even though under seal, will not be enforced (*g*), and is wholly inoperative both at law and in equity (*h*); though an assignment of it for value would be supported in equity as a contract (*i*). It follows that gifts of mere expectancies, or possibilities, cannot be made. Expectancies.

A possibility coupled with an interest is more than a possibility; it is a present interest (*j*). Such interest has been made alienable by deed since the 1st October, 1845 (*k*), and may be validly given (*l*). Possibility coupled with an interest.

SECT. 2.—*Gifts, how made.*

SUB-SECT. 1.—*In General.*

813. There are three modes by which a gift *inter vivos* can be perfectly made, namely: (1) by deed or instrument in writing, (2) by delivery in cases where the subject of the gift admits of delivery, and (3) by declaration of trust, which is the equitable equivalent of a gift. Three means of gift.

(*c*) Shep. Touch. (ed. Preston) p. 244; and see title ANIMALS, Vol. I., p. 365.

(*d*) *R.* v. *Sharpe* (1857), Dears. & B. 160; *R.* v. *Fox* (1841) 2 Q. B. 246; *R.* v. *Scott* (1842), 2 Q. B. 248, n.: *Williams* v. *Williams* (1882), 20 Ch. D. 659. By the Anatomy Act, 1832 (2 & 3 Will. 4, c. 75), s. 8, a person can, in writing at any time, or during his last illness verbally in the presence of two witnesses, direct his body to be examined anatomically, and the examination may take place unless certain relatives object; see titles BURIAL AND CREMATION, Vol. III., p. 405; MEDICINE AND PHARMACY.

(*e*) See title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.*, 400 *et seq.*

(*f*) *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51 (differing from *Re Beaupré's Trusts* (1888), 21 L. R. Ir. 397, C. A.); *Allcard* v. *Walker*, [1896] 2 Ch. 369; *Re Chichester's Estate*, [1908] 1 I. R. 297, C. A.; see also *Dursley (Lord)* v. *Fitzhardinge Berkeley* (1801), 6 Ves. 251, 260; *Smith* v. *A.-G.* (1777), cited 6 Ves. 260; *Davis* v. *Angel* (1862), 4 De G. F. & J. 524; *Clowes* v. *Hilliard* (1876), 4 Ch. D. 413.

(*g*) *Meek* v. *Kettlewell* (1842), 1 Hare 464; affirmed (1843) 1 Ph. 342; *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697.

(*h*) *Re Tilt, Lampet* v. *Kennedy* (1896), 74 L. T. 163.

(*i*) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 548; and see title CHOSES IN ACTION, Vol. IV., p. 376.

(*j*) Watkins, Principles of Conveyancing, 8th ed., 253, n.; compare *Perry* v. *Phelips* (1810), 17 Ves. 173.

(*k*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6; *Re Parsons, Stockley* v. *Parsons, supra.*

(*l*) *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, C. A. The assignment in this case was not of an expectancy, but of property: accordingly the decision has not overruled the rule as to expectancies stated above (see *Re Ellenborough, Towry Law* v. *Burne, supra*, at p. 709).

SECT. 2. SUB-SECT. 2.—*Deed or Instrument in Writing.*

Gifts, how made.

814. The legal estate in land can be granted by deed (*m*) only: but where land is held in trust, a grant of the beneficial interest therein can be made by writing signed by the grantor (*n*).

Legal estates in land.

Formerly land might be legally conveyed by means of a feoffment, but since 1st October, 1845, a feoffment, except one made under custom by an infant, must be evidenced by deed (*o*).

Feoffments.

Registered land.

If the title to land is registered under the Land Transfer Acts, 1875 and 1897 (*p*), the gift of the legal fee simple in land must be made by registered transfer (*q*). But legal and equitable interests in registered land can be disposed of by deed off the register, subject to the paramount power of the registered proprietor to defeat them by registered transfer (*r*); and a donor can create and give to others particular, or limited, interests in registered land, which cannot be so defeated, by means of deeds off the register, protected by notices, cautions, inhibitions, or restrictions (*s*).

Form of deed.

No particular form is necessary for a gift of land by deed. It can be made by an indenture made between the donor and donee or by deed poll under the hand and seal of the donor (*t*). Although it is usual and prudent to have a witness to attest the execution of the deed, this is not necessary except in the case of a transfer of registered land (*u*), or in the case of gifts under statutes which require attestation of the execution by the donor (*x*).

Chattels.

815. Chattels can be conveyed by deed (*a*); and if possession is forthwith taken and retained by the donee, no particular form of deed is required. If the chattels are left in the possession of the donor, the deed must be registered as a bill of sale (*b*). An instrument merely expressing a desire that a person should have a chattel, without any delivery of the chattel, will not pass any property therein (*c*).

(*m*) For the general law relating to deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 355 *et seq.* For forms of deeds appropriate to various cases of gifts, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 129—147.

(*n*) Statute of Frauds (29 Car. 2, c. 3), s. 9. For appropriate forms, see Encyclopædia of Forms and Precedents, Vol. VI., p. 133.

(*o*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3. By the custom of gavelkind an infant of the age of fifteen years can dispose of his land by feoffment, but only for full consideration: the exception, therefore, does not apply to gifts (*Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525); and see title INFANTS AND CHILDREN.

(*p*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*q*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 49.

(*r*) *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A.

(*s*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 50, 53, 57, 58; Land Transfer Act, 1897 (60 & 61 Vict. c. 65); see title REAL PROPERTY AND CHATTELS REAL.

(*t*) See Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5.

(*u*) Land Transfer Rules, 1903, r. 126, and Form 20.

(*x*) *E.g.*, Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (6); see title CHARITIES, Vol. IV., p. 129, and Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

(*a*) For forms of deeds of gift of chattels, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 129 *et seq.*

(*b*) See note (*b*), p. 408, *ante*.

(*c*) *Douglas* v. *Douglas* (1869), 22 L. T. 127.

British ships.

816. A British ship or a share therein can be transferred by bill of sale duly attested and registered at her port of registry (*d*).

817. Some choses in action can be disposed of only by deed or instrument in writing (*e*).

Shares in railway and other companies.

Transfers of shares in railway and other companies formed under the provisions of the Companies Clauses Consolidation Act, 1845 (*f*), must be by deed. But shares in a joint stock company must be transferred in manner provided by the articles of association of the company (*g*). Frequently the articles require the transfer to be by deed, but in default of any regulation in the articles the transfer may be in writing only, and must be executed by both transferor and transferee (*h*).

Registration.

In some cases the title of the transferee is not perfected until the transfer is registered or the transferee has a present absolute and unconditional right to have it registered (*i*). Where an intending donor dies before he has executed the transfers of debenture stock and shares which he has directed to be purchased out of his money, in his wife's name, the passing of the wife's name by the broker to the vendor on the Stock Exchange may complete the gift (*k*).

Policies.

Policies of life assurance must be assigned by an instrument in writing, and in order to perfect the title of the donee to the moneys assured by the policy notice of the assignment must be given to the insurance office (*l*), and the assignment must be duly stamped (*m*).

Consols.

Consols ($2\frac{1}{2}$ per cent. Consolidated Stock) are transferred by entry in the books of the respective accountants-general of the Banks of England and Ireland under the signature of the donor, or his attorney duly authorised by writing under his hand and seal, attested by two or more witnesses. It is optional whether the donee signs or not (*n*).

(*d*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 24, 25, 26. For the law relating to ownership of a British ship and the transfer of shares therein, see title SHIPPING AND NAVIGATION.

(*e*) See title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.*

(*f*) 8 & 9 Vict. c. 16, s. 14.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22.

(*h*) *Ibid.*, Sched. I., Table A, art. 18; and see title COMPANIES, Vol. V., p. 191.

(*i*) *Ibid.*; *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20; *Ireland* v. *Hart*, [1902] 1 Ch. 522; and see title COMPANIES, Vol. V., p. 192.

(*k*) *Re Smith, Bull* v. *Smith* (1901), 84 L. T. 835. As to transfers in blank, see *Burgis* v. *Constantine*, [1908] 2 K. B. 484, C. A.; and *Re Tees Bottle Co., Ltd., Davies' Case* (1876), 33 L. T. 834 (stated by HALL, V.-C., in *Ortigosa* v. *Brown, Janson & Co.* (1878), 38 L. T. 145, to have been affirmed on appeal); and titles COMPANIES, Vol. V., pp. 191 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 384.

(*l*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3. There may, however, be a valid gift of the document constituting the policy without either assignment or notice, though the donee would be unable to recover the money assured by it (*Rummens* v. *Hare* (1876), 1 Ex. D. 169, C. A.); see title INSURANCE. See, too, *Barton* v. *Gainer* (1858), 3 H. & N. 387, where it was held that a gift of a document securing a debt was good, although the debt itself did not pass.

(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 100.

(*n*) National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 22.

SECT. 2. Gifts, how made.

Savings bank deposits.

A depositor, not under sixteen, in a Trustee or Post Office Savings Bank may nominate any person or persons to whom any sum or sums, not exceeding altogether £100, payable to the depositor at his death, shall be paid (*o*).

Friendly societies.

A member of a registered friendly society (other than a benevolent society or working men's club), who is not under sixteen, may also by writing nominate a person to whom any sum of money payable by the society or any branch thereof on the death of the member shall be paid (*p*).

Industrial and provident societies.

Similarly a member, not under sixteen, of a registered industrial and provident society may by writing delivered at or sent to the society's office during his life, or made in a book kept thereat, nominate a person or persons to whom his property in the society shall be transferred at his death, provided the amount credited to him does not exceed £100 (*q*).

Trade unions.

There are similar provisions in regard to members of a trade union (*a*).

SUB-SECT. 3.—*Delivery.*

Gifts unless by deed incomplete without delivery.

818. Gifts of chattels are more often made by delivery than by deed. It is well settled that, if there is no deed, a gift of chattels is not complete unless accompanied by delivery. A verbal gift of chattels without delivery passes no property to the donee, and is not a gift at all (*b*). Actual delivery is not mere evidence of the gift, but is part of the gift itself. In ordinary English language and in legal effect there cannot be a gift without a giving and taking. The giving and taking are the two contemporaneous and reciprocal acts which constitute a gift. They are a necessary part of the proposition that there has been a gift (*c*).

Manual delivery not necessary.

819. Actual manual delivery by the donor to the donee of a chattel is not, however, essential to complete the gift thereof. It is sufficient if the donee be put by the donor in possession of the chattel (*d*). Where chattels cannot be actually delivered owing to

(*o*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), ss. 2, 3; and see title BANKERS AND BANKING, Vol. I., p. 579.

(*p*) Friendly Societies Acts, 1896 (59 & 60 Vict. c. 25), s. 56, and 1908 (8 Edw. 7, c. 32), s. 5; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192; FRIENDLY SOCIETIES, pp. 152 *et seq.*, *ante*.

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25; and see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*a*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 10, and Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 3; and see title TRADE AND TRADE UNIONS.

(*b*) *Shower* v. *Pilck* (1849), 4 Exch. 478; *Bourne* v. *Fosbrooke* (1865), 18 C. B. (N. S.) 515; *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A. The last case establishes the law as correctly laid down by the Court of King's Bench in *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, and overrules the statements of the law on this point by POLLOCK, B., in *Re Harcourt, Danby* v. *Tucker* (1883), 31 W. R. 578; and by CAVE, J., in *Re Ridgway, Ex parte Ridgway* (1885), 15 Q. B. D. 447. "If the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract" (2 Bl. Com. 441).

(*c*) *Cochrane* v. *Moore*, *supra*, *per* Lord ESHER, M.R., at p. 76.

(*d*) *Winter* v. *Winter* (1861), 4 L. T. 639, where a barge was given to the donor's servant, who had previously been in possession thereof as such servant, and kept possession of it afterwards; *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582, where a father to whom the furniture in the house of his daughter had

Constructive delivery.

their bulk, they can be constructively delivered, *e.g.*, by the delivery of the key of a warehouse in which they are stored (*e*). The question has been raised whether a gift of an undivided fourth part of a horse admitted of delivery or whether, on the other hand, it was to be regarded as incorporeal and incapable of delivery. The point was, however, left undecided, the court holding that what took place between the parties amounted to a declaration of trust (*f*).

The delivery need not be made at the time of the gift. Delivery first and gift afterwards is as effectual as gift first and delivery afterwards (*g*).

It seems also that where a chattel of one person is already in the possession of another, though not for the purpose of an intended gift, an effectual verbal gift of it to the latter may be made without any further delivery to him (*h*).

A gift to one for a third person's use is a sufficient delivery to vest the property in the third person (*i*).

Choses in action.

820. By the law merchant and for the convenience of trade or business some choses in action pass by delivery, such as bills of exchange, promissory notes, exchequer bills, cheques to bearer, and bonds and debentures to bearer (*j*), and gifts of them can, therefore, be validly effected by delivery to the donee.

SUB-SECT. 4.—*Declaration of Trust.*

Declaration of trust by donor *sui juris*.

821. If an intending donor, being *sui juris*, declares a trust for another, although for no consideration, it is binding on the creator of the trust, and the donee takes an equitable and enforceable interest whatever be the nature of the property affected by the trust (*k*). It is immaterial whether or not the declaration of trust has been communicated to the donee (*l*). If control is retained by

been assigned by a duly registered bill of sale, came to the house and verbally gave the furniture to his daughter and left her in the room with it; see, too, *Re Alderson, Alderson* v. *Peel* (1891), 64 L. T. 645, but possibly this last case is not consistent with *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.; see *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582, *per* WILLS, J.; compare *Richer* v. *Voyer* (1874), L. R. 5 P. C. 461; and *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*e*) *Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348. On the same principle the property in a church organ has been held to pass by symbolical delivery (*Rawlinson* v. *Mort* (1905), 93 L. T. 555).

(*f*) *Cochrane* v. *Moore, supra*, at p. 73. For a form of deed for such a gift, see Encyclopædia of Forms and Precedents, Vol. VI., p. 132.

(*g*) *Cochrane* v. *Moore, supra*, at p. 70; *Cain* v. *Moon, supra*.

(*h*) *Kilpin* v. *Ratley, supra, per* WILLS, J., at p. 585; *Cain* v. *Moon, supra, per* WILLS, J., at p. 289. But see *Shower* v. *Pilck* (1849), 4 Exch. 478, which conflicts with the statement in the text, and see the observations on the last-mentioned case in *Cochrane* v. *Moore, supra*, at p. 61. The decision, however, in *Shower* v. *Pilck, supra*, can be supported on the ground that there were no words of present gift.

(*i*) *Lucas* v. *Lucas* (1738), 1 Atk. 270.

(*j*) Compare *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; see titles CHOSES IN ACTION, Vol. IV., p. 397; COMPANIES, Vol. V., p. 357.

(*k*) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; *Bentley* v. *Mackay* (1851), 15 Beav. 12; *Gee* v. *Liddell* (No. 1) (1866), 35 Beav. 621; *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, C. A.

(*l*) *Tate* v. *Leithead* (1854), Kay, 658; *New, Prance and Garrard's Trustee* v. *Hunting, supra*.

SECT. 2. Gifts, how made.

a settlor over a fund, it must not be such control as is inconsistent with the intention to create a trust (*m*).

Words importing confidence unnecessary.

A trust may be created although there is an absence of any expression in terms importing confidence (*n*). If, however, the intending donor has not declared himself a trustee for the person whom he wishes to benefit, equity will not assist in completing an imperfect gift by holding that the intending donor is a trustee for the intended donee (*o*), and *a fortiori* will not compel the donor's executor to complete the gift (*p*). Thus, a voluntary covenant to surrender copyholds, though contained in a deed in which freeholds are effectually conveyed, will not be enforced unless words of trust are added (*q*).

Incomplete gift.

The trust, if duly declared, remains valid and must be executed, although the trustee disclaims (*r*).

Requisites of declaration of trust.

822. Declarations of trust of hereditaments must be in writing, signed by the person who can by law declare the trust (*s*). But trusts of pure personalty can be declared by parol (*t*), though they cannot be assigned without writing (*u*).

If the legal estate or right in the property given is in a third person, there must be sufficient evidence of a declaration of trust by the owner of the equitable interest (*v*). The declaration need not be formal: but in order to determine whether a sufficient declaration has been made, the court regards any acts simultaneous with, or subsequent to, the alleged declaration (*w*). The third person is bound to act on the assignment or declaration of trust of the owner of the equitable interest (*x*).

SECT. 3.—*Gifts, when presumed.*

Resulting trusts.

823. Where a person buys property and pays the purchase-money, or part of it, but takes the purchase in the name of another, who is neither his child, adopted child, nor wife, there is *primâ*

(*m*) *Wheatley* v. *Purr* (1837), 1 Keen, 551; see, generally, title TRUSTS AND TRUSTEES.

(*n*) *Page* v. *Cox* (1852), 10 Hare, 163; *Milroy* v. *Lord* (1862), 4 De F. & J. 264, C. A.; *Re Flavell, Murray* v. *Flavell* (1883), 25 Ch. D. 89, C. A.

(*o*) *Ellison* v. *Ellison* (1802), 6 Ves. 656; and see p. 429, *post*.

(*p*) *Ward* v. *Audland* (1845), 8 Beav. 201.

(*q*) *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138; and see p. 429, *post*.

(*r*) *Jones* v. *Jones*, [1874] W. N. 190; *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*s*) Statute of Frauds (29 Car. 2, c. 3), s. 7.

(*t*) *Bayley* v. *Boulcott* (1828), 4 Russ. 345; *M'Fadden* v. *Jenkyns* (1842), 1 Ph. 153, where it was held that a verbal message to a debtor, desiring him to hold the debt in trust for a third person, creates a binding trust (*Peckham* v. *Taylor* (1862), 31 Beav. 250; *Jones* v. *Lock* (1865), 1 Ch. App. 25, where Lord CRANWORTH, L.C., disapproved his own *dictum* to the contrary in *Scales* v. *Maude* (1855), 6 De G. M. & G. 43, 51).

(*u*) Statute of Frauds (29 Car. 2, c. 3), s. 9.

(*v*) *Villers* v. *Beaumont* (1682), 1 Vern. 100; *Ellison* v. *Ellison* (1802), 6 Ves. 656; *Rycroft* v. *Christy* (1840), 3 Beav. 238; *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Meek* v. *Kettlewell* (1842), 1 Hare, 464; *Re Lucan* (*Earl*), *Hardinge* v. *Cobden* (1890), 45 Ch. D. 470, 474.

(*w*) *Bentley* v. *Mackay* (1851), 15 Beav. 12.

(*x*) *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, 198, C. A. As to the general requisites of a declaration of trust, see title TRUSTS AND TRUSTEES.

facie no gift, but a resulting trust for the person paying such money or part (*y*). This presumption can be rebutted by sufficient evidence, even though it may be that of the person in whose name the purchase has been made (*z*).

Transfer into joint names.

The rule applies to the case of a purchase taken in the joint names of the person paying the money and of the other (*a*), and to the case of a voluntary transfer of stock or shares into the name of another jointly with the transferor (*b*) or into that other's name alone (*c*). If the transfer into the joint names is accompanied by an expressed wish as to the mode of employing it and a declaration that no legal obligation is intended to be imposed, the presumption of a resulting trust is rebutted (*d*).

Case of wife, child, and adopted child.

824. But where the person in whose name the purchase or transfer is taken is the wife, child, or adopted child of the man paying the purchase-money or making the transfer, there is then a presumption that a gift was intended (*e*). The rule has been extended to the case of an illegitimate child and to that of a grandchild whose father is dead (*f*), but does not apply to the case of a woman with whom the alleged donor has gone through the form of marriage, but whom he cannot legally marry (*g*), or with whom he merely cohabits (*h*).

The wife must be a legal wife.

In joint names of husband and wife.

Where a husband invests money in the joint names of himself and his wife it is presumed that the survivor is intended to have the investment (*i*), and if he adds the name of another person, that person will be a trustee for the survivor of the husband and wife (*k*).

Mother and child.

825. There is no presumption of a gift where the purchase or investment is made by a mother, even though living apart from her

(*y*) *Plymouth* (*Earl*) v. *Hickman* (1690), 2 Vern. 167; *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92; *Mackreth* v. *Symmons* (1808), 15 Ves. 329, 350; *Wray* v. *Steele* (1814), 2 Ves. & B. 388; *Benbow* v. *Townsend* (1833), 1 My. & K. 506; *Standing* v. *Bowring* (1885), 31 Ch. D. 282, C. A.; *The Venture*, [1908] P. 218, C. A.

(*z*) *Maddison* v. *Andrew* (1747), 1 Ves. Sen. 57; *Deacon* v. *Colquhoun* (1853), 2 Drew. 21; *Garrick* v. *Taylor* (1861), 4 De G. F. & J. 159, C. A.; *Beecher* v. *Major* (1865), 2 Drew. & Sm. 431; affirmed (1865), 13 W. R. 1054; *Fowkes* v. *Pascoe* (1875), 10 Ch. App. 343.

(*a*) *Rider* v. *Kidder* (1805), 10 Ves. 360.

(*b*) *Fowkes* v. *Pascoe*, *supra*; *Standing* v. *Bowring*, *supra*; *George* v. *Bank of England* (1819), 7 Price, 646, where presumption was rebutted.

(*c*) *Down* v. *Ellis* (1865), 35 Beav. 578; *Re Howes*, *Howes* v. *Platt* (1905), 21 T. L. R. 501.

(*d*) *Wheeler* v. *Smith* (1860), 1 Giff. 300.

(*e*) *Scroope* v. *Scroope* (1663), 1 Cas. in Ch. 27; *Grey* (*Lord*) v. *Grey* (*Lady*) (1677), 1 Cas. in Ch. 296; *Ebrand* v. *Dancer* (1680), 2 Cas. in Ch. 26; *Rumboll* v. *Rumboll* (1761), 2 Eden, 15; *Dyer* v. *Dyer*, *supra*; *Finch* v. *Finch* (1808), 15 Ves. 43; *Lorimer* v. *Lorimer* (1822), 10 Ves. (2nd ed.) 367, n.; *Kingdon* v. *Bridges* (1688), 2 Vern. 67; *Crabb* v. *Crabb* (1834), 1 My. & K. 511, where stock was transferred into the names of a son and a third person; *Dummer* v. *Pitcher* (1833), 2 My. & K. 262; *Gosling* v. *Gosling* (1854), 3 Drew. 335; *Hepworth* v. *Hepworth* (1870), L. R. 11 Eq. 10. As to transactions between husband and wife and father and child, generally, see titles HUSBAND AND WIFE; INFANTS AND CHILDREN.

(*f*) *Beckford* v. *Beckford* (1774), Lofft, 490; *Ebrand* v. *Dancer*, *supra*.

(*g*) *Soar* v. *Foster* (1858), 4 K. & J. 152.

(*h*) *Rider* v. *Kidder*, *supra*.

(*i*) *Dummer* v. *Pitcher*, *supra*; *Coates* v. *Stevens* (1834), 1 Y. & C. (EX.) 66; *Low* v. *Carter* (1839), 1 Beav. 426; *Re Gadbury* (1863), 11 W. R. 895; *Re Young*, *Trye* v. *Sullivan* (1885), 28 Ch. D. 705.

(*k*) *Re Eykyn's Trusts* (1877), 6 Ch. D. 115.

SECT. 3. Gifts, when presumed.

husband, or a widow, in the name of her child or in the joint names of herself and her child (*l*), though in the case of a widowed mother very little evidence to prove the intention of a gift is required (*m*), and the mother, if she places herself *in loco parentis*, will be presumed to have intended a gift (*n*).

Where purchase not complete at purchaser's death.

826. If the purchase in the name of the wife, or child, is incomplete at the death of the husband, or father, the wife or child can insist on the completion of the purchase in the wife's, or the child's, name, and payment of the balance of the purchase-money out of the husband's, or father's, estate (*o*).

Receipt of income during donor's life.

827. In these cases, either the person in or into whose name the purchase or transfer is made is wholly a trustee for the true purchaser or there is an absolute gift (*p*), although in some cases the father has actually received the income during his life (*q*).

Policies.

The above rules apply to a policy taken in another's name (*r*).

Presumption of gift rebutted.

The presumption of advancement may be rebutted by showing that there was no present intention to benefit (*s*) or by a contemporaneous declaration by the alleged donor (*t*), but declarations by him subsequent to the purchase or transfer, if they are not so connected with it as to be reasonably regarded as contemporaneous, cannot affect the presumption (*a*). Otherwise, having made a gift, he would be able to take it away.

Examples.

The business relation of the parties may act as a rebuttal of a gift, as, for instance, the fact that a son was solicitor to his parent (*b*). A formal and unmistakable act of taking possession by the alleged donor at the time of the purchase would show his ownership and the trusteeship of the person in whose name the property has been

(*l*) *Re De Visme* (1863), 2 De G. J. & Sm. 17, C. A.; *Bennet* v. *Bennet* (1879), 10 Ch. D. 474, differing from the reasoning in *Sayre* v. *Hughes* (1868), L. R. 5 Eq. 376. In *Batstone v. Salter* (1875), 10 Ch. App. 431, Lord CAIRNS, L.C., and JAMES, L.J., held that a gift in favour of the surviving son-in-law was to be presumed where a mother invested stock in the joint names of herself, her daughter, and her daughter's husband.

(*m*) *Bennet* v. *Bennet*, *supra*.

(*n*) *Re Orme, Evans* v. *Maxwell* (1883), 50 L. T. 51.

(*o*) *Redington* v. *Redington* (1794), 3 Ridg. Parl. Rep. 106; *Drew* v. *Martin* (1864), 2 Hem. & M. 130.

(*p*) *Stock* v. *McAvoy* (1872), L. R. 15 Eq. 55.

(*q*) *Mumma* v. *Mumma* (1687), 2 Vern. 19; *Lamplugh* v. *Lamplugh* (1709), 1 P. Wms. 111; *Taylor* v. *Taylor* (1737), 1 Atk. 386.

(*r*) *Pfleger* v. *Browne* (1860), 28 Beav. 391; *Re Richardson, Weston* v. *Richardson* (1882), 47 L. T. 514; *Re a Policy, No.* 6402, *of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282.

(*s*) *Forrest* v. *Forrest* (1865), 11 L. T. 763.

(*t*) *Stileman* v. *Ashdown* (1742), 2 Atk. 477; *Murless* v. *Franklin* (1818), 1 Swan. 13; *Prankerd* v. *Prankerd* (1820), 1 Sim. & St. 1; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Devoy* v. *Devoy* (1857), 3 Sm. & G. 403; *Dumper* v. *Dumper* (1862), 3 Giff. 583; *Scawin* v. *Scawin* (1841), 1 Y. & C. Ch. Cas. 65; *Stock* v. *McAvoy*, *supra*; *Hoyes* v. *Kindersley* (1854), 2 Sm. & G. 195; *Bone* v. *Pollard* (1857), 24 Beav. 283; *Lloyd* v. *Pughe* (1872), 8 Ch. App. 88; *Pilsworth* v. *Mosse* (1862), 14 I. Ch. R. 163; *Re Blakely Ordnance Co., Coates's Case* (1876), 46 L. J. (CH.) 367; *Re Gooch, Gooch* v. *Gooch* (1890), 62 L. T. 384.

(*a*) *Sidmouth* v. *Sidmouth*, *supra*; *Fox* v. *Fox* (1863), 15 I. Ch. R. 89; *O'Brien* v. *Sheil* (1873), 7 I. R. Eq. 255; *Forrest* v. *Forrest*, *supra*.

(*b*) *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244.

purchased (*c*). Subsequent declarations of the alleged donee might rebut the gift, as it is against his interest to make them (*d*).

Where the original transfer of stock is a gift, anything added to that account is presumably also a gift (*e*).

Resulting uses.

828. In a voluntary conveyance of real property, unless the use is declared in favour of the grantee, there is a presumption that the use results to the grantor, which use is executed by the Statute of Uses (*f*); so that when the grantor declares no use, nothing passes under the grant (*g*). But this presumption may be rebutted (*h*).

Covenants to stand seised.

A covenant to stand seised to the use of a child, wife, or kinsman of lands of which the covenantor is seised, passes the legal estate to the child, wife, or kinsman without any further consideration than that arising from kinsmanship (*i*).

There is no legal presumption of a resulting trust for the donor on a voluntary conveyance of land to the use of another person, but the facts may show the contrary (*k*).

Investment in husband's name of wife's property.

829. There is no presumption that an investment of, or purchase with, a wife's money, whether capital or savings of income, in her husband's name is a gift to him (*l*), though he may have a lien for any contributions of his (*m*), and if she voluntarily assures property to him for a particular purpose, such as raising money, the property remains hers, subject to the fulfilment of the particular purpose (*n*). So where an estate belonging to the wife is mortgaged and the equity of redemption is reserved to the heirs of the husband, there is *primâ facie* a resulting trust for the wife and her heirs, the mere form of the reservation of the equity of redemption not being sufficient to alter the previous title (*a*). But each such case must depend on its particular circumstances, and in each the intention must be collected from the instrument which has given rise to the question (*b*).

Surrounding circumstances.

In all cases of suggested gifts or resulting trusts the surrounding circumstances must be taken into consideration (*c*).

(*c*) *Stock* v. *McAvoy* (1872), L. R. 15 Eq. 55.

(*d*) *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; and compare *Redington* v. *Redington* (1794), 3 Ridg. Parl. Rep. 106, 195, 197.

(*e*) *Fowkes* v. *Pascoe* (1875), 10 Ch. App. 343.

(*f*) 27 Hen. 8, c. 10, for a further treatment of which see title REAL PROPERTY AND CHATTELS REAL.

(*g*) *Villers* v. *Beamont* (1556), 2 Dyer, 146 a; *Beckwith's Case* (1589), 2 Co. Rep. 56 b, 58 b; *Armstrong* d. *Neve* v. *Wolsey* (1755), 2 Wils. 19; *Roe* d. *Roach* v. *Popham* (1778), 1 Doug. (K. B.) 25. These are chiefly cases of fines or recoveries, but the principle applies to a grant (see note (t) to *Beckwith's Case*, *supra* (1826 ed., p. 587); compare *Lynch* v. *Clarkin*, [1900] 1 I. R. 178, C. A.; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 359.

(*h*) *Roe* d. *Roach* v. *Popham*, *supra*.

(*i*) 2 Bl. Com. 337; *Lloyd* v. *Spillet* (1740), 2 Atk. 148.

(*k*) *Back* v. *Andrews* (1690), Prec. Ch. 1; *Young* v. *Peachy* (1742), 2 Atk. 254, 256; *Haigh* v. *Kaye* (1872), 7 Ch. App. 469; *Crichton* v. *Crichton* (1895), 65 L. J. (CH.) 13; but compare *Childers* v. *Childers* (1857), 1 De G. & J. 482, C. A.

(*l*) *Darkin* v. *Darkin* (1853), 17 Beav. 578; *Mercier* v. *Mercier*, [1903] 2 Ch. 98, C. A.; see also *Scales* v. *Baker* (1859), 28 Beav. 91; *Maddison* v. *Chapman* (1861), 1 John. & H. 470; *Dixon* v. *Dixon* (1878), 9 Ch. D. 587.

(*m*) *Neesom* v. *Clarkson* (1845), 4 Hare, 97; *Maddison* v. *Chapman*, *supra*.

(*n*) *Re Marlborough* (*Duke*), *Davis* v. *Whitehead* (1894), 42 W. R. 456.

(*a*) *Jackson* v. *Innes* (1819), 1 Bli. 104, H. L.; *Dawson* v. *Whitehaven Bank* (1877), 6 Ch. D. 218, C. A., *per* COTTON, L.J., at p. 228; and see title HUSBAND AND WIFE.

(*b*) *Plomley* v. *Felton* (1888), 14 App. Cas. 61, P. C., *per* Lord MACNAGHTEN, at p. 66.

(*c*) *Mercier* v. *Mercier*, *supra*.

SECT. 4. **Legal Incidents.**

SECT. 4.—*Legal Incidents.*

SUB-SECT. 1.—*Acceptance.*

Presumption of acceptance.

830. Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even though he is not aware of the gift (*d*), and this is equally so, although the gift be of an onerous nature, or of what is called "an onerous trust" (*e*). The doctrine has been applied, so as to defeat the title of the Crown, which intervened between the execution of a voluntary assignment to a trustee and his knowledge of, and assent to, the deed (*f*). So a transfer of stock to a person without his knowledge with intention to confer a benefit on him, vests the property in him at once, and cannot afterwards be revoked by the donor even before the donee knows of the transfer (*g*). Even a father's gift of such things as a watch, books, or clothes to his infant child cannot be recalled by him if he has given them absolutely in the first instance (*h*). The presumption of acceptance in these cases is artificial, but is founded on human nature. A man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of so doing were given to him (*i*).

Repudiation by donee.

But a man cannot be compelled to take what he does not desire to accept. A donee, therefore, on becoming aware of the gift is entitled to repudiate it, and by so doing may not only disclaim all benefit, but will be relieved of all burdens or liabilities which the acceptance of the gift might have imposed on him (*k*).

SUB-SECT. 2.—*Revocation and Avoidance.*

Gifts *primâ facie* irrevocable.

831. The donor of a completed gift is *primâ facie* not entitled to revoke it nor to recall any payment made voluntarily (*l*). Where an instrument is formally sealed and delivered and there is nothing but the retention of the deed in the possession of the executing party to qualify the delivery, and nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and delivery to the party who is to take under it or to any person for his use is not essential. Though the contents have not

(*d*) Shep. Touch., 7th ed., p. 285. "The law presumes that every grant is for the benefit of the grantee, and therefore, until the contrary is shown, supposes an agreement to the grant" (*Butler and Baker's Case* (1591), 3 Co. Rep. 25 a; *Thompson* v. *Leach* (1690), 2 Vent. 198).

(*e*) *Siggers* v. *Evans* (1855), 5 E. & B. 367.

(*f*) *Smith* v. *Wheeler* (1671), 1 Vent. 128; *Small* v. *Marwood* (1829), 9 B. & C. 300, 306.

(*g*) *Standing* v. *Bowring* (1885), 31 Ch. D. 282, C. A.

(*h*) *Hunter* v. *Westbrook* (1827), 2 C. & P. 578; *Smith* v. *Smith* (1836), 7 C. & P. 401.

(*i*) *London and County Banking Co.* v. *London and River Plate Bank* (1888), 21 Q. B. D. 535, 542, C. A. But see *Hill* v. *Wilson* (1873), 8 Ch. App. 888, 896.

(*k*) *Mallott* v. *Wilson*, [1903] 2 Ch. 494, 501. As to acceptance by an infant, see p. 405, *ante*.

(*l*) *Villers* v. *Beaumont* (1682), 1 Vern. 100; *Slater* v. *Burnley Corporation* (1888), 59 L. T. 636. As to ademption of legacies by portions, see titles EQUITY, Vol. XIII., p. 128; WILLS; and as to bringing advances into hotchpot on the distribution of an intestate's estate, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 19 *et seq.*

been communicated to the beneficiaries, such a deed cannot be revoked unless a power of revocation is reserved (*m*).

Creditors' deeds.

832. A deed executed in favour of creditors who are not parties, nor privies, is revocable by the debtor at any time before the creditors have assented thereto (*n*). The principle, however, on which this doctrine is founded is that, in executing the creditors' deed, the debtor has no intention to create a perfect trust for his creditors, but desires to make an arrangement for his own personal convenience for payment of his debts in an order prescribed by himself and over which he retains control (*o*). The principle, therefore, does not conflict with the cases (*p*), which establish that if a trust be perfectly created in favour of a volunteer it cannot afterwards be revoked.

When creditor's deed irrevocable.

If, however, a creditor is a party or privy to the deed (*q*) or the trustee of the creditors' deed takes a beneficial, as well as a legal, interest under it, then the deed cannot be revoked (*r*). The same rule applies, even though the creditor is not a party to the deed, if he has notice given to him by or through the debtor of its existence, by being expressly or impliedly told that he may look to the trust property for payment of his demand. In such case he becomes a *cestui que trust* (*s*).

The trust is not revocable if created for the purpose of repairing breaches of trust or if the surrounding circumstances show an intention to create the relation of trustee and *cestui que trust* (*t*). It is irrevocable after the death of the settlor or of one of the settlors (*a*), or if its provisions are not to take effect until after the settlor's death (*b*).

Presumption of fraud.

833. Donors, though *sui juris*, are entitled to have their gifts set aside if induced by fraud, coercion, or undue influence, for the donee must not profit by his own wrong (*c*). There is no

(*m*) *Boughton* v. *Boughton* (1739), 1 Atk. 625: *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671; *Bill* v. *Cureton* (1835), 2 My. & K. 503, where a spinster made a settlement not in contemplation of marriage, and it was held that it could not be revoked; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Hope* v. *Harman* (1847), 11 Jur. 1097; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296; see also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 385.

(*n*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 328, and cases there cited, and also *Garrard* v. *Lauderdale* (*Lord*) (1830), 3 Sim. 1; affirmed (1831), 2 Russ. & M. 451; *Law* v. *Bagwell*, *Evans* v. *Bagwell* (1843), 4 Dr. & War. 398; *Browne* v. *Cavendish*, *Cavendish* v. *Browne* (1844), 1 Jo. & Lat. 606; *Henderson* v. *Rothschild* (1886), 33 Ch. D. 459. The assent of one creditor is sufficient to render the deed irrevocable (*Harland* v. *Binks* (1850), 15 Q. B. 713).

(*o*) *Garrard* v. *Lauderdale* (*Lord*), *supra*, at p. 455.

(*p*) *E.g.*, *Ellison* v. *Ellison* (1802), 6 Ves. 656; *Pulvertoft* v. *Pulvertoft* (1811), 18 Ves. 84, 99; *Paul* v. *Paul* (1882), 20 Ch. D. 742, C. A.

(*q*) *Acton* v. *Woodgate* (1833), 2 My. & K. 492; *Synnot* v. *Simpson* (1854), 5 H. L. Cas. 121; *Montefiore* v. *Browne* (1858), 7 H. L. Cas. 241.

(*r*) *Siggers* v. *Evans* (1855), 5 E. & B. 367.

(*s*) *Synnot* v. *Simpson*, *supra*.

(*t*) *New*, *Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, C. A.; *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

(*a*) *Synnot* v. *Simpson*, *supra*; *Priestley* v. *Ellis*, *supra*.

(*b*) *Re Fitzgerald's Settlement*, *Fitzgerald* v. *White* (1887), 37 Ch. D. 18, C. A.

(*c*) *Bridgman* v. *Green* (1755), 2 Ves. Sen. 627; *Norton* v. *Relly* (1764), 2 Eden,

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presumption of fraud because the donor is old (*d*) or merely of weak character (*e*); but, where an illiterate or an aged and infirm person purports to give all his property to another, even to his wife, the court must be satisfied that he knew what he was doing before the gift will be enforced (*f*).

Undue influence.

Gifts will be avoided on the ground of undue influence, first, where the court is satisfied that the gift was the result of influence expressly used by the donee for the purpose, and secondly, where the relations between the donor and donee have at, or immediately before, the time of the gift been such as to raise a presumption that the donee had influence over the donor (*g*). The donee in such case must prove that the donor was either emancipated from his influence or placed by the possession of independent advice in a position equivalent to emancipation (*h*).

Parent and child.

In the case of parent and child the independent adviser must protect the donor against himself; and, if he is not satisfied that the gift is a right and proper one in the circumstances, he must advise his client not to go on with the transaction and refuse to act further for him if he persists (*h*).

Solicitor and client.

The best and possibly the only advice which can properly be given to a client who has arranged to make a gift to his solicitor is to tell him not to do so (*i*). A gift to the solicitor will be upheld only if the relation of solicitor and client has ceased and the influence may reasonably be supposed also to have ceased (*k*).

Ratification.

834. The donor can after the removal of the influence ratify the gift, but he must know his rights and, being a free agent, determine to forego them (*l*), or at any rate elect to abide by the gift. Such election, if proved, is sufficient, although it is not proved that he knew that he has power to retract it (*m*).

Lapse of time.

So long as the relation which invalidates the gift continues, lapse

286; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Whyte* v. *Meade* (1840), 2 I. Eq. R. 420; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A. The subject of undue influence is fully dealt with under titles EQUITY, Vol. XIII., pp. 17 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, p. 107, *ante*.

(*d*) *Lewis* v. *Pead* (1789), 1 Ves. 19.

(*e*) *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129.

(*f*) *Price* v. *Price* (1852), 1 De G. M. & G. 308, C. A.; *Anderson* v. *Elsworth* (1861), 3 Giff. 154; and see title EQUITY, Vol. XIII., pp. 15 *et seq.*

(*g*) *Allcard* v. *Skinner*, *supra*, *per* COTTON, L.J. For the relations to which the rule applies, see title EQUITY, Vol. XIII., p. 18. As to rebuttal of this presumption, see *Re Coomber*, *Coomber* v. *Coomber*, [1911] 1 Ch. 174, and title FRAUDULENT AND VOIDABLE CONVEYANCES, pp. 103 *et seq.*, *ante*.

(*h*) *Powell* v. *Powell*, [1900] 1 Ch. 243; *The London and Westminster Loan and Discount Co., Ltd.* v. *Bilton* (1911), 27 T. L. R. 184.

(*i*) *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A., *per* COZENS-HARDY, L.J., at p. 62; but see judgment of Lord BROUGHAM in *Hunter* v. *Atkins* (1834), 3 My. & K. 113, at p. 135, and *Goddard* v. *Carlisle* (1821), 9 Price, 169. A similar rule applies to the relation of barrister and client, see title BARRISTERS, Vol. II., p. 395.

(*k*) See *dictum* of TURNER, L.J., in *Holman* v. *Loynes* (1854), 4 De G. M. & G. 270, C. A., at p. 283 (a case of purchase from a client). In *Re Holmes' Estate*, *Woodward* v. *Humpage* (1861), 3 Giff. 337, it was said that the presumption of undue influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client.

(*l*) *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; *Tyars* v. *Alsop* (1889), 61 L. T. 8, C. A.

(*m*) *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.

of time is no bar to the avoidance of the gift, but the donor must seek relief within a reasonable time after the removal of the influences under which the gift was made. After a long lapse of time he will be presumed to have elected not to avoid it, or to have adopted or ratified it (*n*). The lapse of six years is a material element for consideration (*o*).

The right to avoid the gift passes to the personal representatives of the donor (*p*).

A gift will not be set aside if it is of small amount (*q*).

Mistake.

835. Although a gift may be set aside on the ground of mistake alone, yet where there is no fraud or undue influence, express or implied, and no mistake induced by those who derive benefit under the gift, the mistake must be of a very serious character to induce the court to order the donee to restore the gift (*r*).

Effect of misrepresentation.

Where a gift has been made on a misrepresentation of fact, though an innocent one, the donor can avoid the gift, unless he elect, by conduct or otherwise, not to do so (*s*). So if the gift is made under the influence of a delusion relating to matters spiritual or temporal, the right to set it aside is clear (*t*).

Gift to intended wife.

A man who has become engaged to a lady, and is afterwards rejected by her, can recover presents of any considerable value which he has made to her, or their value; but cannot recover any that he may have given in order to introduce himself to her acquaintance and gain her favour (*a*).

SUB-SECT. 3.—*Conditions and Repugnancy.*

Conditions precedent and subsequent.

836. Gifts may be made subject to conditions either precedent or subsequent. A condition precedent is one to be performed before the gift has taken effect; a condition subsequent is one to be performed after the gift has taken effect, though it is not necessary that the estate or interest should be vested (*b*), as a contingent interest can vest in right though not in possession (*c*).

Condition subsequent preferred.

If the intention of the donor as evidenced by the words he has used points to the inference that he intended the condition to be subsequent rather than precedent, then, if the words are

(*n*) *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A.

(*o*) *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n.; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, 630; *Allcard* v. *Skinner*, *supra*, at p. 186.

(*p*) *Tyars* v. *Alsop* (1889), 61 L. T. 8, C. A.; *Allcard* v. *Skinner*, *supra*, *per* LINDLEY, L.J., at p. 187; *Anderson* v. *Elsworth* (1861), 3 Giff. 154; *Coutts* v. *Acworth* (1869), L. R. 8 Eq. 558.

(*q*) *Allcard* v. *Skinner*, *supra*, at p. 185; *Rhodes* v. *Bate* (1865), 1 Ch. App. 252.

(*r*) *Ogilvie* v. *Littleboy*, [1897] W. N. 53, C. A. Forgetfulness has been regarded as mistake (*Hood of Avalon* (*Lady*) v. *Mackinnon*, [1909] 1 Ch. 476, preferring the judgments of KAY and LOPES, L.JJ., in *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417, C. A., to that of Lord ESHER, M.R., in the same case; compare *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 952; and *Ellis* v. *Ellis* (1909), 26 T. L. R. 166; and see, generally, title MISTAKE).

(*s*) *Re Glubb*, *Bamfield* v. *Rogers*, [1900] 1 Ch. 354, C. A. (dissenting from *Wilson* v. *Thornbury* (1875), 10 Ch. App. 239); as to misrepresentation, actual or constructive, see title MISREPRESENTATION AND FRAUD.

(*t*) *Nottidge* v. *Prince* (1860), 2 Giff. 246.

(*a*) *Robinson* (*Sir John*) v. *Cumming* (1742), 2 Atk. 409.

(*b*) *Egerton* v. *Brownlow* (*Earl*) (1853), 4 H. L. Cas. 1.

(*c*) *Barnes* v. *Allen* (1782), 1 Bro. C. C. 181; *Egerton* v. *Brownlow* (*Earl*), *supra*.

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capable of both constructions, the court holds the condition to be subsequent (*d*).

Imposed on an infant.

If a condition precedent is imposed on an infant, which can be performed by him, but is not, the gift will not take effect, but, if the condition is subsequent, the infant will not lose the gift by non-performance during infancy (*e*).

Impossible condition.

Where a condition precedent attached to a gift is impossible of performance the gift will not take effect; but if a condition subsequent is impossible, the gift is absolute (*f*).

Repugnant conditions.

837. Where there is an absolute gift of real or personal property and a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the condition (*g*). Thus a condition that a person to whom an absolute interest has been given shall not alienate nor charge it, or that his wife shall not be endowed, nor her husband be tenant by the curtesy, or that his daughters shall not inherit, or that the interest shall not be liable to execution nor to the bankruptcy laws, or that he shall not make a testamentary disposition of it, nor commit waste, are instances of repugnant conditions (*h*). So also is the condition that a tenant in tail shall not disentail (*i*).

Gift over on intestacy.

By the law of England if a man dies intestate, his real estate goes to his heir and his personalty to his next of kin, and any disposition tending to contravene the disposition which the law thus makes is against the policy of the law and void (*j*).

Restraint on alienation.

Although restraint on alienation of an absolute interest in possession during a certain period is bad (*k*), a condition that the donee

(*d*) *Re Greenwood, Goodhart* v. *Woodhead*, [1903] 1 Ch. 749, C. A., *per* COLLINS, M.R., at p. 755.

(*e*) Co. Litt. 246 b; *Bevan* v. *Mahon-Hagan* (1891), 27 L. R. Ir. 399; *Partridge* v. *Partridge*, [1894] 1 Ch. 351; *Re Edwards, Lloyd* v. *Boyes*, [1910] 1 Ch. 541.

(*f*) Co. Litt. 206 a; *Re Greenwood, Goodhart* v. *Woodhead, supra; Re Croxon, Croxon* v. *Ferrers*, [1904] 1 Ch. 252 (these are cases of wills, but the same principles apply); *Peyton* v. *Bury* (1731), 2 P. Wms. 626.

(*g*) *Bradley* v. *Peixoto* (1797), 3 Ves. 324; *Byng* v. *Strafford (Lord)* (1843), 5 Beav. 558, 567; *Watkins* v. *Williams* (1851), 3 Mac. & G. 622; *Egerton* v. *Brownlow (Earl)* (1853), 4 H. L. Cas. 1, *per* Lord TRURO, at p. 181. The same rule applies if the condition is that the donee commit a crime (Co. Litt., s. 334).

(*h*) Co. Litt., 222 b; *Portington's (Mary) Case* (1613), 10 Co. Rep. 35 b, 39 a; *Bradley* v. *Pexioto, supra; Gulliver* v. *Vaux* (1746), 8 De G. M. & G. 167, n.; *Brandon* v. *Robinson* (1811), 18 Ves. 429; *Ross* v. *Ross* (1819), 1 Jac. & W. 154; *Rishton* v. *Cobb* (1839), 5 My. & Cr. 145, 153; *Holmes* v. *Godson* (1856), 8 De G. M. & G. 152, C. A.; *Hood* v. *Oglander* (1865), 34 Beav. 513; *Re Jones's Will* (1870), 23 L. T. 211; *Shaw* v. *Ford* (1877), 7 Ch. D. 669; *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176, where it was held that the defeasance was bad whether by way of condition or conditional limitation. As to the recognition paid by the court to an inalienable interest in a Scottish heritable bond, see *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A., and title CONFLICT OF LAWS, Vol. VI., p. 209.

(*i*) *Dawkins* v. *Penhryn (Lord)* (1878), 4 App. Cas. 51.

(*j*) *Muschamp* v. *Bluet* (1617), J. Bridg. 132; *Gulliver* v. *Vaux, supra; Bull* v. *Kingston* (1816), 1 Mer. 314; *Cuthbert* v. *Purrier* (1822), Jac. 415; *Ware* v. *Cann* (1830), 10 B. & C. 433; *Holmes* v. *Godson, supra*; *Re Wilcocks' Settlement* (1875), 1 Ch. D. 229. On a death on or since the 1st January, 1898, real estate devolves upon the personal representative in trust for the persons beneficially entitled thereto; see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1 (1), 2 (1); and titles DESCENT AND DISTRIBUTION, Vol. XI., p. 4; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

(*k*) *Renaud* v. *Tourangeau* (1867), L. R. 2 P. C. 4; *Re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801; but see *Kearsley* v. *Woodcock* (143), 38 Hare, 185. The

shall not alienate a reversionary interest appears to be good (*l*), and so is a condition that the donee shall not alienate to a particular person or class of persons (*m*).

A restraint on alienation except to a particular person is bad, but the law as to the restraint on alienation except to a particular class of persons cannot be said to be clear (*n*). If a restriction on the price is added the restraint has been held to be void (*o*). One property can be given on condition that another is not alienated, for such a gift does not interfere with the power of the donee to alienate the property given, and so there is no repugnancy (*p*).

Void restraints.

Where the gift is absolute in the first instance, a restraint on the power of leasing is void on the same principle as a restraint on alienation (*q*). After an absolute gift a proviso of forfeiture on bankruptcy or alienation is void (*r*). A gift over of what the donee of an absolute interest in the corpus or income does not dispose of is void (*s*).

In short, an incident of the estate given, which cannot be directly taken away nor prevented by the donor, cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, nor by a conditional limitation which would cause it to shift to another person (*t*). The above rule applies also where the subject of the gift is for life only (*u*).

Gifts for life.

838. Property is sometimes made inalienable by Act of Parliament (*a*).

Property inalienable by statute.

839. A condition in total restraint of marriage is void (*b*), but not one in partial restraint (*c*). But in the case of realty, except in

In restraint of marriage.

law stated in this section does not apply in its entirety to married women, who may be restrained during coverture from alienating their separate property; see p. 424, *post*, and title HUSBAND AND WIFE.

(*l*) *Churchill* v. *Marks* (1844), 1 Coll. 441; *Re Payne* (1858), 25 Beav. 556; *Re Porter, Coulson* v. *Capper*, [1892] 3 Ch. 481.

(*m*) Co. Litt. 223 a; *Re Macleay* (1875), L. R. 20 Eq. 186; *Re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801.

(*n*) *Muschamp* v. *Bluet* (1617), J. Bridg. 132; *Attwater* v. *Attwater* (1853), 18 Beav. 330 (dissenting from *Doe* d. *Gill* v. *Pearson* (1805), 6 East, 173); but see *Re Macleay, supra*.

(*o*) *Crofts* v. *Beamish*, [1905] 2 I. R. 349, C. A.

(*p*) Co. Litt. 223 a.

(*q*) *Re Rosher, Rosher* v. *Rosher, supra*.

(*r*) *Brandon* v. *Robinson* (1811), 18 Ves. 429; *Re Machu* (1882), 21 Ch. D. 838; *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176; *Corbett* v. *Corbett* (1888), 14 P. D. 7, C. A.; *Metcalfe* v. *Metcalfe* (1889), 43 Ch. D. 633.

(*s*) *Ross* v. *Ross* (1819), 1 Jac. & W. 154; *Bourn* v. *Gibbs* (1830), Taml. 414; *Green* v. *Harvey* (1842), 1 Hare, 428; *Watkins* v. *Williams* (1851), 3 Mac. & G. 622; *Bowes* v. *Goslett* (1857), 6 W. R. 8; *Henderson* v. *Cross* (1861), 29 Beav. 216; *Parnell* v. *Boyd*, [1896] 2 I. R. 571, 595, C. A.; *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438; *Re Walker, Lloyd* v. *Tweedy*, [1898] 1 I. R. 5. *Doe* d. *Stevenson* v. *Glover* (1845), 1 C. B. 448, *contra*, cannot be reconciled with the other decisions. All these cases relate to gifts by will, but it seems that the same principle applies to gifts by deed or instrument in writing *inter vivos*.

(*t*) *Re Dugdale, Dugdale* v. *Dugdale, supra, per* KAY, J., at p. 182.

(*u*) *Brandon* v. *Robinson, supra; Metcalfe* v. *Metcalfe, supra*.

(*a*) See note (*q*), p. 408, *ante*.

(*b*) *Morley* v. *Rennoldson, Morley* v. *Linkson* (1843), 2 Hare, 570; *Re Bellamy, Pickard* v. *Holroyd* (1883), 48 L. T. 212; *Re Wright, Mott* v. *Issott*, [1907] 1 Ch. 231.

(*c*) *Gillet* v. *Wray* (1715), 1 P. Wms. 284; *Scott* v. *Tyler* (1788), 2 Bro. C. C. 431; *Stackpole* v. *Beaumont* (1796), 3 Ves. 89; *Lloyd* v. *Branton* (1817), 3 Mer. 108; *Re Nourse, Hampton* v. *Nourse*, [1899] 1 Ch. 63; *Re Whiting's Settlement, Whiting* v. *De Rutzen*, [1905] 1 Ch. 96, C. A. So a gift subject to a condition that a man or woman shall not remarry is good (*Newton* v. *Marsden* (1862), 2

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the case of a tenancy in tail (*d*), a limitation over on marriage is not bad, unless the intention of the donor is to restrain marriage and promote celibacy. In the ordinary case the donor makes such a limitation over in the expectation that a woman who marries will be maintained by her husband (*e*).

Gifts until alienation or bankruptcy.

A gift of income can be made upon trust for a person until attempted alienation or bankruptcy (*f*), or until marriage (*g*) and then over; and though a man, or an unmarried woman, cannot take an absolute gift in such a way that he or she cannot alienate it, a married woman can be restrained from anticipating property given to her for her separate use, or as her separate property, under the Married Women's Property Act, 1882 (*h*), so long as she is married, but if she becomes unmarried again the restraint at once ceases.

Restraint on anticipation.

Illegal purposes.

840. A gift for an illegal purpose may expose the offender to the criminal law, such as a gift for the maintenance of an action in which the donor has no interest (*i*), or a gift relating to the nomination or appointment to or resignation of a public office (*k*), or a gift to a member, officer, or servant of a public body on account of doing or forbearing to do anything in respect of any matter in which such public body is concerned (*l*), or a gift to a voter (including treating) at or in connection with an election (*m*), or a gift to an agent as an inducement or reward for doing or not doing any act in relation to his principal's affairs or for showing or not showing favour or disfavour to any person in relation thereto (*n*).

Bribery.

Illegal commissions.

A gift, if an illegal act is performed, invalid.

Though a gift with a condition subsequent that the donee should commit a crime is good and the condition can be disregarded (*o*), a gift in respect of an act which is illegal, *e.g.*, to commit a murder, is ineffectual though the act be performed (*p*).

Test of illegality.

Gifts are necessarily illegal if their tendency is to promote unlawful acts, without regard to the amount of the inducement held out or interest created, or to the position of the parties, or to any other circumstances which go to affect the probability of the unlawful act being done (*q*).

John. & H. 356; *Evans* v. *Rosser* (1864), 2 Hem. & M. 190; *Allen* v. *Jackson* (1875), 1 Ch. D. 399, C. A.); and see title WILLS.

(*d*) *Arundel's (Earl) Case* (1575), 3 Dyer, 342 b.

(*e*) *Jones* v. *Jones* (1876), 1 Q. B. D. 279 (the rule as to realty being founded on the common law of England, and that as to personalty on the civil law).

(*f*) *Brandon* v. *Robinson* (1811), 18 Ves. 429.

(*g*) *Morley* v. *Rennoldson*, *Morley* v. *Linkson* (1843), 2 Hare, 570; *Re Bellamy*, *Pickard* v. *Holroyd* (1883), 48 L. T. 212; see title SETTLEMENTS.

(*h*) 45 & 46 Vict. c. 75; see title HUSBAND AND WIFE.

(*i*) See title ACTION, Vol. I., p. 51.

(*k*) Sale of Offices Act, 1809 (49 Geo. 3, c. 126), s. 4.

(*l*) Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), s. 1. For definition of public body, see *ibid.*, s. 7.

(*m*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 484; ELECTIONS, Vol. XII., pp. 281 *et seq.*

(*n*) Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 1. A person serving under the Crown or any corporation, or any municipal, borough, county or district council, or any board of guardians, or any person employed by or acting for another, is included in the term "agent" (*ibid.*, sub-ss. (2), (3)).

(*o*) Co. Litt. 206 b.

(*p*) Shep. Touch. (Ed. Preston) p. 129.

(*q*) *Egerton* v. *Brownlow* (*Earl*) (1853), 4 H. L. Cas. 1, *per* Lord BROUGHAM, at p. 174. The subject of gifts in relation to gaming is dealt with fully under title GAMING AND WAGERING, pp. 266 *et seq.*, *post*.

SECT. 4. Legal Incidents.

As a general rule an agent cannot retain as against his principal a gift from a third person in connection with his principal's affairs without the knowledge of the principal (*r*), and an agent who corruptly accepts any gift for doing or forbearing to do acts in relation to his principal's affairs or business is guilty of a misdemeanour, and the donor of the gift is equally guilty (*s*).

Gifts to agent.

SUB-SECT. 4.—*Miscellaneous Incidents.*

841. A gift alleged to have been made by a deceased person cannot, as a general rule, be established without some corroboration (*t*). Corroboration is some testimony supporting a material point in the testimony to be corroborated (*u*); it may be supplied by the evidence of some other person or by some attendant circumstances or by some facts established *aliunde* (*v*). The mere fact that the subject of the alleged gift was kept in the house belonging to the wife, if that was the home or one of the homes of the husband, would not be regarded as corroborative of the wife's allegation of a gift (*a*). On the other hand, proof that the alleged donor was at the time making gifts to other members of his family is corroborative of the claimant's story (*b*). In some cases the judges have definitely stated that the court cannot act on the unsupported testimony of a person in his own favour, but it appears that there is no hard and fast rule that the evidence of the alleged donee must be disbelieved if uncorroborated. It must be examined with care, even with suspicion, but if it brings conviction to the tribunal which has to try the case that conviction will be acted on (*c*).

Evidence to prove alleged gifts by deceased persons.

842. Voluntary bonds are debts, and can be enforced against the person creating them or legatees from him, but in the administration of his estate will not be paid until after his debts for valuable consideration (*d*). If, however, any person interested under a voluntary bond assigns his beneficial interest for value, the claim

Voluntary bonds in administration.

(*r*) See title AGENCY, Vol. I., p. 190, and the cases there cited.

(*s*) Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34). See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 710.

(*t*) *Consett* v. *Bell* (1842), 1 Y. & C. Ch. Cas. 569; *Grant* v. *Grant* (1865), 34 Beav. 623; *Down* v. *Ellis* (1865), 35 Beav. 578; *Hartford* v. *Power* (1869), 3 I. R. Eq. 602; *Hughes* v. *Seanor* (1869), 18 W. R. 108; *Rogers* v. *Powell* (1869), 18 W. R. 282; *Morley* v. *Finney* (1870), 18 W. R. 490, where JAMES, V.-C., gives as a reason for the rule that "the temptation to lie is so strong, and the facility with which a lie may be concocted is so great"; *Hill* v. *Wilson* (1873), 8 Ch. App. 888; *Re Whittaker, Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657; *Re Finch, Finch* v. *Finch* (1883), 23 Ch. D. 267, C. A.; *Re Harnett, Leahy* v. *O'Grady* (1886), 17 L. R. Ir. 543.

(*u*) *Re Finch, Finch* v. *Finch, supra, per* JESSEL, M.R., at p. 272.

(*v*) *Down* v. *Ellis, supra, per* Lord ROMILLY, M.R., at p. 581.

(*a*) *Re Finch, Finch* v. *Finch, supra.*

(*b*) *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A., *per* Lord ESHER, M.R., at p. 400.

(*c*) *Re Garnett Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, C. A.; *Re Richardson, Shillito* v. *Hobson, supra; Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Rawlinson* v. *Scholes* (1898), 79 L. T. 350; *Re Farman, Farman* v. *Smith* (1887), 57 L. J. (CH.) 637; *Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch. D. 76, C. A.; *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 341.

(*d*) *Lomas* v. *Wright* (1833), 2 My. & K. 769; *Markwell* v. *Markwell* (1864), 34 Beav. 12; *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468.

SECT. 4. Legal Incidents.

of the assignee in the administration of the estate of the donor of the bond stands upon the same footing as if the bond had been originally given for value (*e*).

Promissory note.

A promissory note, not given for value, does not constitute the payee a creditor (*f*), but where a promissory note, not given for value, has been cancelled and a fresh one given on a compromise and interest paid under it, the fresh note will be paid before legacies (*g*).

Gift subject to a charge.

843. Where a person makes a gift of property, which with other property is subject to a charge, and in the gift there is not any reference to the charge, nor any covenant for title, then if the donor created the charge and is personally liable to pay it, the donee cannot be called on to pay any part of it (*h*): but if the donor took the property subject to the charge and is not personally liable to pay it, the donee takes subject to the charge (*i*).

Covenants for title.

A covenant for further assurance or against incumbrances, or a declaration that the property being given is free from incumbrances, might show that the property retained by the donor is to bear the whole of the incumbrance (*k*). In a gift by deed the donor should not give covenants for title; the covenants implied by a conveyance "as beneficial owner" are implied only in a conveyance for valuable consideration (*l*).

Completion of building on land the subject of the gift.

844. Where a person has entered into a contract with builders for the erection of a building on property, which he has in his lifetime conveyed to another absolutely, and the contract is not completed at his death, that other cannot require its completion at the expense of the estate of the deceased (*m*). But if the property passes to his devisee or heir-at-law as such, such devisee or heir-at-law can have the contract completed at the expense of the personal estate of the deceased (*n*).

Gifts for particular purposes.

845. Where a person obtains an absolute conveyance or gift for a particular purpose, and afterwards makes use of it for another purpose, the court will interfere on the ground of fraud (*o*).

But if a gross sum or the whole income of the property is given, and a special purpose of the gift is declared, the gift is treated as absolute, and the purpose as merely the motive of the gift, so that the donee will take the gift, the declared purpose being disregarded (*p*).

(*e*) *Payne* v. *Mortimer* (1859), 4 De G. & J. 447, C. A.

(*f*) *Re Whitaker* (*a Person of Unsound Mind*) (1889), 42 Ch. D. 119, C. A., *per* COTTON, L.J., at p. 124; see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 496, note (*p*).

(*g*) *Dawson* v. *Kearton* (1856), 3 Sm. & G. 186.

(*h*) *Re Darby's Estate, Rendall* v. *Darby*, [1907] 2 Ch. 465.

(*i*) *Ker* v. *Ker* (1869), 4 I. R. Eq. 15, C. A.

(*k*) *Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461 (a case, however, where there was valuable consideration).

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (A); and see titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*m*) *Re Day, Sprake* v. *Day*, [1898] 2 Ch. 510; see title BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS, Vol. III., p. 273.

(*n*) *Holt* v. *Holt* (1694), 2 Vern. 322; *Cooper* v. *Jarman* (1866), L. R. 3 Eq. 98; *Re Day, Sprake* v. *Day*, *supra*.

(*o*) *Young* v. *Peachy* (1742), 2 Atk. 254.

(*p*) *Barlow* v. *Grant* (1684), 1 Vern. 255; *Nevill* v. *Nevill* (1702), 2 Vern. 431; *Barton* v. *Cooke* (1800), 5 Ves. 461; *Hammond* v. *Neame* (1818), 1 Swan. 35;

Covenants to settle after-acquired property.

A donor cannot by any declaration as to his intention prevent an absolute gift falling within the operation of any covenant or bargain made by the donee in regard to it, so that if a woman in her marriage settlement has covenanted to settle her after-acquired property, and property coming within the terms of the covenant is given to her without a general restraint on anticipation, no declaration of intention on the part of the donor will prevent the covenant taking effect (*q*).

Cumulative gifts.

846. Where a donor by one deed gives annuities to certain persons, and by another deed gives annuities to some of the same persons of different amount, the annuities are cumulative, though the donor may stand *in loco parentis* to some of the annuitants (*r*).

Dangerous gifts.

847. The donor of a gift the enjoyment of which may cause injury to the donee is not liable for such injury, unless at the time of the gift he knew of the danger to the donee and did not warn him (*s*). The gift must be enjoyed as it is given and taken with its risks, but subject to this, that if the donor knows of some evil character in it at the time and does not warn the donee, he is responsible, although it was a gift (*t*).

Pretended consideration.

848. If a conveyance is expressed to be for valuable consideration, though in fact none was paid, the grantee, if he asserts that a gift was intended, must produce the clearest evidence of the alleged donor's intention, otherwise there will be a resulting trust for the grantor (*u*).

Surplus of voluntary subscriptions.

849. Where money is publicly subscribed for the benefit of certain persons and there is no provision for its application after their deaths, there is a resulting trust for the donors and their representatives (*v*). If, however, it should be subscribed for the education of certain children and there remains a sum in the hands of trustees, after they have grown up, it will be divided among the children (*a*).

If honorary members of a society make absolute gifts to it, and all the beneficial interest in the funds of the society is exhausted, there is no resulting trust of the surplus in favour of the honorary members, but the property passes to the Crown (*b*).

Leche v. *Kilmorey* (*Lord*) (1823), Turn. & R. 207; *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; *Re Skinner's Trusts* (1860), 1 John. & H. 102; *Re Sanderson's Trust* (1857), 3 K. & J. 497; and see title WILLS.

(*q*) *Re Allnutt, Pott* v. *Brassey* (1882), 22 Ch. D. 275; *Scholfield* v. *Spooner* (1884), 26 Ch. D. 94, C. A., where certain expressions by WOOD, V.-C., in *Re Mainwaring's Settlement* (1866), L. R. 2 Eq. 487, to the contrary effect were dissented from; *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681, 687.

(*r*) *Palmer* v. *Newell* (1856), 8 De G. M. & G. 74, C. A.; see title EQUITY, Vol. XIII., p. 133.

(*s*) *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371, where it was said that there must be something like fraud on the part of the giver before he can be made liable.

(*t*) *Lowery* v. *Walker*, [1910] 1 K. B. 173, C. A., *per* BUCKLEY, L.J., at p. 190; reversed on another point, [1911] A. C. 10.

(*u*) *Hughes* v. *Seanor* (1869), 18 W. R. 108; *Coultwas* v. *Swan* (1870), 22 L. T. 539; and see *Bridgman* v. *Green* (1755), 2 Ves. Sen. 627.

(*v*) *Re Abbott Fund Trusts, Smith* v. *Abbott*, [1900] 2 Ch. 326; and see *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294, 307, 308.

(*a*) *Re Andrew's Trust, Carter* v. *Andrew*, [1905] 2 Ch. 48.

(*b*) *Braithwaite* v. *A.-G.*, [1909] 1 Ch. 510; and see, generally, titles CHARITIES, Vol. IV., pp. 181, 197; DESCENT AND DISTRIBUTION, Vol. XI., p. 28.

SECT. 4. Legal Incidents.

Gift restored to donor.

850. Where dominion over the subject of the gift is restored by the donee to the donor, the gift is at an end (*c*).

Estate duty.

851. Modern legislation has imposed duties on gifts *inter vivos* made in certain circumstances. Thus, estate duty is payable on the death of the donor in respect of gifts of property made less than three years before his death and also in respect of any gift, whenever made, of which *bonâ fide* possession and enjoyment have not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him (*d*).

Stamp duty.

Ad valorem stamp duty as on a conveyance or transfer on sale is also payable on conveyances or transfers (with certain exceptions) operating as voluntary dispositions *inter vivos*, the duty being calculated according to the value of the property conveyed or transferred (*e*).

Part V.—Incomplete Gifts.

Court will not complete incomplete gift.

852. When a gift rests merely in promise or unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it (*f*).

It is revocable.

An incomplete gift can be revoked at any time (*g*).

A cheque revoked by donor's death.

A cheque is a mandate to the donor's bankers, which is revoked by his death, unless before that event the cheque is presented and paid, or presented but not paid by the bankers though there were funds to the drawer's credit sufficient to pay it (*h*). If, however, there were not sufficient funds to the drawer's credit, then the cheque, though presented, but not paid, would be revoked by the donor's death (*i*).

Irrevocable if assigned for valuable consideration.

If a person to whom another gives, as a present, a cheque on his own account, pays it away for valuable consideration, or in payment of a debt of his own, before the bankers are apprised of the drawer's death, the gift is, apparently, not revoked (*k*).

(*c*) *James* v. *James* (1869), 19 L. T. 809.

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59. The duty is not payable on gifts in consideration of marriage, or which are part of the normal and reasonable expenditure of the donor, or which, in the case of any donee, do not exceed in the aggregate £100 in value or amount (Finance (1909-10) Act, 1910, s. 59 (2)). The duty is payable by the donee (*Re Beddington, Micholls* v. *Samuel*, [1900] 1 Ch. 771; and compare *Re Hudson, Spencer* v. *Turner*, [1911] 1 Ch. 206); see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 187, 220.

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74.

(*f*) *Wycherley* v. *Wycherley* (1763), 2 Eden, 175; *Ellison* v. *Ellison* (1802), 6 Ves. 656; *Hooper* v. *Goodwin* (1818), 1 Swan. 485; *Ward* v. *Audland* (1845), 8 Beav. 201; *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, C. A.; *Lambert* v. *Overton* (1864), 11 L. T. 503; *Forrest* v. *Forrest* (1865), 11 L. T. 763.

(*g*) *Standing* v. *Bowring* (1885), 31 Ch. D. 282, 290, C. A.

(*h*) *Tate* v. *Leithead* (1854), Kay, 658; *Bromley* v. *Brunton* (1868), L. R. 6 Eq. 275.

(*i*) *Bromley* v. *Brunton*, *supra*.

(*k*) *Tate* v. *Hilbert* (1793), 2 Ves. 111, 118; *Rolls* v. *Pearce* (1877), 5 Ch. D. 730; see title BANKERS AND BANKING, Vol. I., p. 607.

If a person merely places a cheque, drawn by a third person in his favour, into the hand of another and then takes it away and locks it up, there is not a complete gift (*l*).

Equitable mortgagee handing over deed.

The mere handing over by a mortgagee of a deed deposited with him by way of equitable mortgage, though accompanied by words of gift, is an incomplete gift, and does not pass any interest in the equitable mortgage (*m*).

Distinction between incomplete gifts and declarations of trust.

853. The principle of the distinction between a declaration of trust and an intended gift is that in the former case a person shows an intention to make himself a trustee, whereas words of gift show an intention to deliver over the property to another, and not to retain it in the intending donor's possession for any purpose, fiduciary or otherwise (*n*). Consequently the courts will not construe incomplete gifts as declarations of trust in order to make them effective (*o*).

An imperfect or illegal trust.

The intention to declare a trust may be incomplete or the trust may be an attempt to evade the law, and in neither of these cases will the gift be upheld (*p*).

The court will not assist donor to revoke.

But though the court will not assist an intended donee to complete an incomplete gift, neither will it, at the instance of a donor who

(*l*) *Jones* v. *Lock* (1865), 1 Ch. App. 25.

(*m*) *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A.

(*n*) *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11, *per* JESSEL, M.R.

(*o*) *Mallott* v. *Wilson*, [1903] 2 Ch. 494, *per* BYRNE, J., at p. 500; *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, C. A. The following are some of the cases in which the proper formalities of a present gift not having been observed, the attempt to establish a declaration of trust has failed:—*Antrobus* v. *Smith* (1805), 12 Ves. 39 (shares in the Forth and Clyde Navigation); *Cotteen* v. *Missing* (1815), 1 Madd. 176 (letter consenting to a sum being given); *Edwards* v. *Jones* (1836), 1 My. & Cr. 226 (bond); *Dillon* v. *Coppin* (1839), 4 My. & Cr. 647 (East India stock and shares in the Globe Insurance Company); *Meek* v. *Kettlewell* (1843), 1 Ph. 342 (assignment of a *spes successionis* which operates only as an agreement); *Searle* v. *Law* (1846), 15 Sim. 95 (turnpike securities); *Price* v. *Price* (1851), 14 Beav. 598 (gift of land, a house, and chattels by deed poll), affirmed on appeal, on different grounds (1852), 1 De G. M. & G. 308, C. A.; *Bridge* v. *Bridge* (1852), 16 Beav. 315 (Columbian bonds, Consols, and cash); *Weale* v. *Ollive* (1853), 17 Beav. 252 (United States bank shares); *Beech* v. *Keep* (1854), 18 Beav. 285 (Consols); *Peckham* v. *Taylor* (1862), 31 Beav. 250 (where power of attorney not acted on); *Richards* v. *Delbridge*, *supra* (leasehold mill, plant, machinery, and stock in trade); *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340 (statements of a gift held to be of a testamentary character); *Moore* v. *Moore* (1874), L. R. 18 Eq. 474 (debenture); *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233 (shares in a colliery); *Re Breton's Estate, Breton* v. *Woollven* (1881), 17 Ch. D. 416 (furniture); *Re Shield, Pethybridge* v. *Burrow* (1885), 53 L. T. 5, C. A. (debenture stock); *Re Ashcroft, Ex parte Kirby* (1887), 3 T. L. R. 562 (Dutch Rhenish Railway shares included in a voluntary settlement); *Vincent* v. *Vincent* (1887), 56 L. T. 243, C. A. (where a man sent a letter to his future wife, saying he willed and bequeathed to her certain property); *O'Flaherty* v. *Browne*, [1907] 2 I. R. 416, C. A. (deposit receipt—an attempt to pass property after death without making a will); and see, generally, title EQUITY, Vol. XII., pp. 97 *et seq.*

(*p*) *Smith* v. *Warde*, *Duckett* v. *Warde* (1845), 15 Sim. 56, where a father intended that stock should be transferred into his own and his wife's names in trust for his child, but the bank refused to allow any reference to the trust and no formal declaration was ever executed; *Field* v. *Lonsdale* (1850), 13 Beav. 78, where, in the case of an investment in a savings bank in a man's name in trust

PART V. Incomplete Gifts.

repents of his intended gift, compel a deed of inchoate gift to be delivered up (*q*).

Completion of incomplete gift.

854. The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him that he may build a house on it, and the donee accordingly, with the assent of the donor, expends a large sum in building a house, the donee can call on the donor or his representatives to complete the gift (*r*).

Appointment of intended donee as executor.

An imperfect gift may also be perfected by the donor appointing the donee to be his executor (*s*) or one of his executors (*a*). In this case, however, the intention to give must not be an intention of testamentary benefaction, although the intended donee is the executor; for, if so, the rule cannot apply, the prescribed formalities for testamentary disposition not having been observed (*b*). Further, there must be a present intention of giving certain definite property, the gift being imperfect for some reason at law, and not a mere promise to pay on a future occasion (*c*). The rule applies to the intended forgiveness of a debt by a testator, if there is sufficient evidence of his intention during his life to forgive it (*d*).

Promises to make a gift to a charity.

855. A promise to pay a sum of money to some charitable object, though part may have been paid in the lifetime of the promisor, cannot be enforced against his estate (*e*). But it has been held that if a person promises to leave a sum of money to a school society for the prosecution of their undertaking, and in consequence the society establish a school, the society can recover the sum promised (*f*).

Uncertainty of object of gift.

856. If the object of an intended gift is uncertain, there is no gift unless there is some power of selection, or election, in the intended donee (*g*), and the power of making it certain rests with the donee, except in special cases (*h*).

for his sister, in order to evade a rule as to the amount permitted on deposit, it was held that no trust was created.

(*q*) *De Hoghton* v. *Money* (1865), 35 Beav. 98.

(*r*) *Dillwyn* v. *Llewelyn* (1862), 4 De G. F. & J. 517.

(*s*) *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408.

(*a*) *Re Stewart, Stewart* v. *McLaughlin*, [1908] 2 Ch. 251.

(*b*) *Ibid.*, at p. 255; *Selwin* v. *Brown* (1735), 3 Bro. Parl. Cas. 607; *Re Hyslop, Hyslop* v. *Chamberlain*, [1894] 3 Ch. 522.

(*c*) *Re Innes, Innes* v. *Innes*, [1910] 1 Ch. 188.

(*d*) *Strong* v. *Bird, supra; Re Applebee, Leveson* v. *Beales*, [1891] 3 Ch. 422.

(*e*) *Re Hudson, Creed* v. *Henderson* (1885), 54 L. J. (CH.) 811; see title CHARITIES, Vol. IV., p. 146.

(*f*) *Re Soames, Church Schools Co.* v. *Soames* (1897), 13 T. L. R. 439.

(*g*) Shep. Touch. (Ed. Preston) pp. 242, 250, 252. Thus a gift of "a horse or a cow" (in the disjunctive), or of one of the donor's horses, when he has several, gives a power of selection to the donee which must be exercised in the donor's lifetime.

(*h*) Perkins, Profitable Book (Laws of England), 15th ed., p. 17.

Part VI.—Gifts Mortis Causâ.

PART VI. Gifts Mortis Causâ.

857. A gift *mortis causâ* has already been defined (*i*). It is a singular form of gift, being one which is neither entirely *inter vivos* nor testamentary (*k*). It must be made in contemplation of death, and only takes effect in case of death (*l*), and must not be in contemplation of suicide, as that would be against public policy (*m*).

Nature of the gift.

For an effectual *donatio mortis causâ* it is essential that (1) the gift be made in contemplation, though not necessarily in expectation, of death; (2) there be delivery to the donee of the subject of the gift; (3) the gift be made in circumstances which show that it is to take effect only if the death of the donor follows (*n*).

Essentials.

The title of the donee can never be complete until the donor is dead, and if the subject of the gift is not then completely vested in the donee the question arises whether he can call on the representatives of the donor to make good his title (*o*). A good *donatio mortis causâ*, where the subject of the gift is not completely vested in the donee, raises by operation of law a trust, which is therefore not within the Statute of Frauds (*p*), and under which the donee can call on the representatives of the donor to complete the gift (*q*). The title remains in the donor until the event happens which is to divest him, that is his death, so that if it appears that the donor intended to divest his interest at once, the transaction will be treated as a gift *inter vivos*, complete or incomplete as the case may be, and not as a *donatio mortis causâ* (*r*).

Raises a trust.

If immediate gift intended, no *donatio mortis causâ*.

There is an implied condition that the gift is to be retained only in the event of death, though the donor does not expressly say so (*s*). The death may take place some time afterwards (*t*), but if the

Only retained if donor dies.

(*i*) See p. 399, *ante;* see also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 223.

(*k*) *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, *per* BUCKLEY, J., at p. 892.

(*l*) *Gardner* v. *Parker* (1818), 3 Madd. 184. But the death contemplated need not be death from sickness (*Walter* v. *Hodge* (1818), 2 Swan. 92, 100).

(*m*) *Agnew* v. *Belfast Banking Co.*, [1896] 2 I. R. 204, C. A., where it was also held that as the intending donor had been held to have committed suicide during temporary insanity, she was mentally incapable of making the gift.

(*n*) *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*o*) *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, H. L. In *Cosnahan* v. *Grice* (1862), 7 L. T. 82, P. C., it is stated that the fact of the donor being on his death-bed is sufficient proof of the gift being made in contemplation of death.

(*p*) 29 Car. 2, c. 3, s. 8.

(*q*) *Duffield* v. *Elwes, supra; Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch. D. 76, 82, C. A.

(*r*) *Tate* v. *Hilbert* (1793), 2 Ves. 111; *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; *Re Patterson's Estate, Mitchell* v. *Smith* (1864), 4 De G. J. & Sm. 422, C. A.

(*s*) *Gardner* v. *Parker* (1818), 3 Madd. 184; see *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, 553; *Tate* v. *Leithead* (1854), Kay, 658, 662.

(*t*) *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.

PART VI. Gifts Mortis Causâ.

donor recovers from the illness during which the gift is made the donee has no title, and can only hold what was delivered to him in trust for the donor (*u*).

Delivery of chattels.

858. In the case of chattels personal, delivery of the subject-matter of the gift is necessary (*a*), but it need not be at the actual moment of the gift (*b*), and antecedent delivery, even *alio intuitu*, is sufficient (*c*). Complete dominion over the subject-matter of the gift must be intended to pass to the donee (*d*), but where the property is too bulky for delivery, the means of coming at the possession or making use of it, *e.g.*, a key, may be delivered, so as to constitute a good *donatio* (*e*). On the other hand, delivery of something merely as a symbol of the subject-matter of the intended gift is not sufficient (*f*).

Resumption of possession.

859. If the donor resumes possession, the gift is ended (*g*).

Delivery in the case of choses in action.

860. In the case of a chose in action delivery is also necessary, unless there is a formal transfer to the donee, but as physical delivery is impossible, delivery of a document essential to its recovery may suffice (*h*). The test of whether a document is a good subject of a *donatio* is whether it expresses the terms on which the money is held and shows what the contract between the parties is (*i*). A mere receipt for money is insufficient, but if reference is made in it to interest and length of notice required for withdrawal, this will satisfy the test (*k*).

Instances of good *donationes mortis causâ*.

The following documents have been held to satisfy the test and

(*u*) *Staniland* v. *Willott* (1852), 3 Mac. & G. 664.

(*a*) *Bunn* v. *Markham* (1816), 7 Taunt. 224; *Ward* v. *Turner* (1752), 2 Ves. Sen. 431; *Re Hughes* (1888), 59 L. T. 586, C. A. A mere shifting from one drawer to another is insufficient (*Bryson* v. *Brownrigg* (1803), 9 Ves. 1). Although in *Tate* v. *Hilbert* (1793), 2 Ves. 111, it is said to be conceivable that the gift might be made by deed or writing, it is improbable that it should be so when the donor is *in extremis*.

(*b*) *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.

(*c*) *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*d*) *Hawkins* v. *Blewitt* (1798), 2 Esp. 663; *Reddel* v. *Dobree* (1839), 10 Sim. 244; *Treasury Solicitor* v. *Lewis*, [1900] 2 Ch. 812; *Re Johnson, Sandy* v. *Reilly* (1905), 92 L. T. 357, where it was held that there was no *donatio*, as the intending donor retained the key.

(*e*) *Jones* v. *Selby* (1710), Prec. Ch. 300 (key of a trunk); *Mustapha* v. *Wedlake*, [1891] W. N. 201 (key of a wardrobe in which was the key of a safe containing bonds which were held to pass).

(*f*) *Ward* v. *Turner*, *supra*, at p. 442.

(*g*) *Bunn* v. *Markham*, *supra*, at p. 232; *Cant* v. *Gregory* (1894), 10 T. L. R. 584, C. A. But merely keeping it by donor's direction in a box of his for safety (*Re Taylor, Taylor* v. *Taylor* (1887), 56 L. J. (CH.) 597), or in a book-case of the donor of which the donee has the keys (*Wildish* v. *Fowler* (1888), 5 T. L. R. 113), is not giving him back possession.

(*h*) *Duckworth* v. *Lee*, [1899] 1 I. R. 405, C. A. Even in the case of a formal transfer there would usually be delivery of the instrument of transfer, but in the case of inscribed stock it would appear that the transfer into the name of the donee would be sufficient; see remarks of Lord HARDWICKE, L.C., in *Ward* v. *Turner*, *supra*, at pp. 443, 444.

(*i*) *Moore* v. *Darton* (1851), 4 De G. & Sm. 517; *Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch. D. 76, C. A.; *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.

(*k*) *Moore* v. *Darton*, *supra*.

their delivery to operate as a good *donatio mortis causâ* of the property to which they refer, namely:—bank notes (*l*); bankers' deposit notes, though unindorsed (*m*); bills of exchange payable to donor or order, though not due until after his death and not indorsed (*n*); bonds (*o*); cheques drawn by the donor and cashed in his lifetime (*p*); cheques payable to donor or order, though not indorsed (*q*); mortgage deeds (*r*); policies of assurance (*s*); Post Office Savings Bank books (as regards a cash deposit, but not as regards Government stock therein referred to) (*a*); promissory notes to order and not indorsed (*b*).

Not good *donationes mortis causâ.*

The following documents do not pass the test, namely:—certificates for building society shares (*c*); certificates for railway stock (*d*); cheques drawn by donor and not presented in his lifetime (*e*), though his banker's pass-book is delivered with them (*f*), or presented and not paid in his lifetime, if his account is overdrawn (*g*); a cheque for part of the money on a deposit account (*h*); an I.O.U. (*i*); investment certificates and Post Office Savings Bank deposit books, so far as Government stock is concerned (*j*); receipts for Government stock (*k*); private savings bank books governed by the Trustee

(*l*) *Miller* v. *Miller* (1735), 3 P. Wms. 356; *Wildish* v. *Fowler* (1888), 5 T. L. R. 113.

(*m*) *Amis* v. *Witt* (1863), 33 Beav. 619; *Moore* v. *Moore* (1874), L. R. 18 Eq. 474; *Re Farman, Farman* v. *Smith* (1887), 58 L. T. 12; *Cassidy* v. *Belfast Banking Co.* (1887), 22 L. R. Ir. 68, where note headed "not transferable"; *Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch. D. 76, C. A.; *Porter* v. *Walsh*, [1895] 1 I. R. 284; affirmed, [1896] 1 I. R. 148, C. A.; *Hudson* v. *Spencer*, [1910] 2 Ch. 285.

(*n*) *Rankin* v. *Weguelin* (1832), 27 Beav. 309 (in which case, however, it does not appear whether the bills were indorsed by the donor or his executors); *Re Mead, Austin* v. *Mead* (1880), 15 Ch. D. 651.

(*o*) *Snellgrove* v. *Baily* (1744), 3 Atk. 214; *Gardner* v. *Parker* (1818), 3 Madd. 184.

(*p*) *Bouts* v. *Ellis* (1853), 17 Beav. 121; affirmed, 4 De G. M. & G. 249, C. A.; *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, 895, 897, where BUCKLEY, J., said that it would be sufficient for the bankers to undertake with the donee to hold the amount of the cheque for him.

(*q*) *Clement* v. *Cheesman* (1884), 27 Ch. D. 631.

(*r*) *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, H. L.

(*s*) *Amis* v. *Witt*, *supra*.

(*a*) *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.

(*b*) *Veal* v. *Veal* (1859), 27 Beav. 303.

(*c*) *Re Weston, Bartholomew* v. *Menzies*, *supra*.

(*d*) *Moore* v. *Moore*, *supra*.

(*e*) *Hewitt* v. *Kaye* (1868), L. R. 6 Eq. 198; *Re Hughes* (1888), 59 L. T. 586, C. A.; *Re Davis, Griffiths* v. *Davis* (1902), 86 L. T. 889. This is recognised as law, in spite of LINDLEY, L.J.'s statement in *Re Dillon, Duffin* v. *Duffin*, *supra*, at p. 83, that the effect of a man giving his own cheque "may some day require consideration."

(*f*) *Re Beak's Estate, Beak* v. *Beak* (1872), L. R. 13 Eq. 489.

(*g*) *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, where the bank would probably have honoured the cheque if satisfied as to the signature.

(*h*) *Re Mead, Austin* v. *Mead*, *supra*.

(*i*) *Duckworth* v. *Lee*, [1899] 1 I. R. 405, C. A., disapproving Lord ROMILLY'S *dictum* in *Hewitt* v. *Kaye*, *supra*, at p. 200.

(*j*) *Re Andrews, Andrews* v. *Andrews*, [1902] 2 Ch. 394.

(*k*) *Ward* v. *Turner* (1752), 2 Ves. Sen. 431 (South Sea Annuities); Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87).

PART VI. Gifts Mortis Causâ.

Savings Banks Act, 1863 (*l*); promissory notes drawn by the donor in favour of the donee (*m*).

Cheque negotiated in donor's lifetime.

It appears that if a cheque drawn by the donor and delivered to the donee is paid away by the donee either for valuable consideration or in discharging a debt of his own, or if the donee receives the amount for which it is drawn, immediately after the donor's death, before the bankers are apprised of it, the gift is good (*n*).

Land will not pass by delivery of deeds.

An estate in land, as distinguished from a security on land, will not pass by delivery of title deeds without a conveyance (*o*).

Delivery by agent.

861. The actual delivery to the donee or the agent of the donee need not be by the donor himself, but may be by a person directed by him to make it (*p*). But the delivery must be to the donee or someone for the donee; for mere delivery to an agent in the character of agent for the donor amounts to nothing (*q*).

Donatio on trust or for a special purpose.

862. The delivery to the donee may be as trustee for any other person or persons or for a special purpose (*r*). The expression of the trust or condition must form part of the donation, and be either contemporaneous with it or be so coupled with it by contemporaneous words of reference as, in effect, to be incorporated with it (*s*).

Revocation.

The mere fact of a legacy being given to the donee of an amount equal to a previous gift *mortis causâ* is not of itself a revocation of the gift (*a*). The legacy may be a satisfaction of the prior gift if the circumstances show that this was the testator's intention. For example, it may be a satisfaction where the doctrine of double portions applies, or if the gift be made in satisfaction of the debt of a creditor and a legacy of equal amount is given to that creditor (*b*). But if there are no circumstances showing such intention, the donee will be entitled both to the legacy and the gift (*c*).

(*l*) *M'Gonnell* v. *Murray* (1869), 3 I. R. Eq. 460, as explained by *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.

(*m*) *Holliday* v. *Atkinson* (1826), 5 B. & C. 501.

(*n*) *Tate* v. *Hilbert* (1793), 2 Ves. 111, 118; *Rolls* v. *Pearce* (1877), 5 Ch. D. 730.

(*o*) *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, H. L., *per* Lord ELDON, at pp. 530, 539, 543; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 376.

(*p*) *Miller* v. *Miller* (1735), 3 P. Wms. 356; compare *Hutchieson's Executrix* v. *Shearer*, [1909] S. C. 15.

(*q*) *Farquharson* v. *Cave* (1846), 2 Coll. 356; *Powell* v. *Hellicar* (1858), 26 Beav. 261; *Moore* v. *Darton* (1851), 4 De G. & Sm. 517; *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889; *Re Kirkley, Cort* v. *Watson* (1909), 25 T. L. R. 522.

(*r*) *Blount* v. *Barrow* (1792), 4 Bro. C. C. 72; *Hills* v. *Hills* (1841), 8 M. & W. 401, where the donor desired the donee to pay for her funeral out of the gift; *Bouts* v. *Ellis* (1853), 17 Beav. 121; affirmed, 4 De G. M. & G. 249, C. A.

(*s*) *Dunne* v. *Boyd* (1874), 8 I. R. Eq. 609.

(*a*) *Hudson* v. *Spencer*, [1910] 2 Ch. 285. The case of *Jones* v. *Selby* (1710), Prec. Ch. 300, is not an authority to the contrary; for Lord HARCOURT by his judgment in that case only meant that the legacy there was intended to be in satisfaction of the previous provision made for the legatee; see *Hudson* v. *Spencer*, *supra*, at p. 290. The last-mentioned case supplies the answer to the third question raised in the head-note to *Hambrooke* v. *Simmons* (1827), 4 Russ. 25.

(*b*) *Hudson* v. *Spencer*, *supra*, *per* WARRINGTON, J., at p. 290.

(*c*) *Ibid.* See also titles EQUITY, Vol. XIII., pp. 129 *et seq.*; WILLS.

863. Gifts *mortis causâ*, being in the nature of legacies, are subject to the debts of the donor (*d*). They are also subject to legacy (*e*) and estate duty (*f*).

(*d*) *Smith* v. *Casen*, cited (1718), 1 P. Wms. 406; *Ward* v. *Turner* (1752), 2 Ves. Sen. 431, 434; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 224.

(*e*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4.

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 187, 233. A direction in a will for the payment of testamentary expenses does not relieve the donee from paying the estate duty on his *donatio* (*Re Hudson, Spencer* v. *Turner* [1911] 1 Ch. 206, following *Porte* v. *Williams*, [1911] 1 Ch. 188).

GLEANING.

See AGRICULTURE.

GLEBE.

See ECCLESIASTICAL LAW.

GOLD AND SILVER.

See CONSTITUTIONAL LAW.

GOLDSMITH'S LICENCE.

See REVENUE.

GOODS, SALE OF.

See SALE OF GOODS.

GOODWILL.

See PARTNERSHIP; TRADE.

GOVERNMENT.

See CONSTITUTIONAL LAW; PARLIAMENT.

GRAND JURY.

See JURIES.

GRAND SERJEANTY.

See CONSTITUTIONAL LAW; REAL PROPERTY AND CHATTELS REAL.

GRAVE.

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See AGRICULTURE; ANIMALS.

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GRETNA GREEN MARRIAGES.

See HUSBAND AND WIFE.

GROUND GAME.

See GAME.

GROUND RENTS.

See LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

GROWING CROPS.

See AGRICULTURE; BILLS OF SALE; DISTRESS; LANDLORD AND TENANT; SALE OF LAND.

GUARANTEE.

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Part I.—Definitions and Classifications.

864. A guarantee is an accessory (*a*) contract (*b*), whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriages (*c*) of another person (*d*), whose primary liability to the promisee must exist or be contemplated (*e*). Guarantee.

It is often termed, in cases and text books, a "collateral" (*f*) or

(*a*) A guarantee is essentially a contract of an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, and without the support of which it must fail (see *Mountstephen* v. *Lakeman* (1871), L. R. 7 Q. B. 196, Ex. Ch., *per* WILLES, J., at p. 202; *Lakeman* v. *Mountstephen* (1874), L. R. 7 H. L. 17, *per* Lord SELBORNE, at pp. 24, 25).

(*b*) Suretyship arises out of contract, not from tort (*Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A., *per* FRY, L.J., at p. 151).

(*c*) For the meaning of the words "debt, default, or miscarriages," which occur in the Statute of Frauds (29 Car. 2, c. 3), s. 4, see note (*s*), p. 455, *post*. The plural of the word miscarriage is used in this enactment.

(*d*) For the meaning of these words, see pp. 455, 458 *et seq.*, *post*. There can be no suretyship unless there be a principal debtor, who, however, may be constituted in the course of a transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship (*Lakeman* v. *Mountstephen*, *supra*, *per* Lord SELBORNE, at pp. 24, 25). Moreover, a person cannot contract or covenant with himself against another's default (see *Ellis* v. *Kerr*, [1910] 1 Ch. 529).

(*e*) A shorter definition of a guarantee than that given in the text is contained in the Indian Contract Act, 1872 (Act IX. of 1872), s. 126, namely:—"A contract of guarantee is a contract to perform the promise or discharge the liability of a third person, in case of his default"; see pp. 458 *et seq.*, *post*, where the principles determining to what promises of guarantee the Statute of Frauds (29 Car. 2, c. 3), s. 4, applies are considered.

(*f*) The word "collateral" does not occur in the Statute of Frauds (29 Car. 2, c. 3), s. 4, and cannot, therefore, with safety be accepted as affording a certain criterion of whether a promise is or is not within that enactment. Moreover, the use of this word, without a proper definition thereof, is apt to cause a misapprehension of its meaning (see *Harris* v. *Huntbach* (1757), 1 Burr. 373, *per* Lord MANSFIELD, C.J., at p. 375), which has often been discussed in cases where the incidence of a mortgage debt was in controversy. According to these cases,

PART I. Definitions and Classifications.

conditional contract, in order to distinguish it from one that is "original" and "absolute" (*g*).

A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger of the simple contract debt of the principal debtor, to which it relates (*h*) and, generally, when the principal contract or liability is determined, so also is the guarantee itself (*i*).

Continuing guarantee.

A continuing guarantee is one which extends to a series of transactions and is not exhausted by nor confined to a single credit or transaction (*k*).

the strict literal interpretation of the word "collateral" is "parallel" or "additional" (*Re Athill, Athill* v. *Athill* (1880), 16 Ch. D. 211, C. A., *per* JESSEL, M.R., at p. 222), and it does not carry the signification "secondary," unless the circumstances of the cases justify such a construction (*ibid.*). Neither does it necessarily, of itself, bear the meaning "auxiliary" (*Early* v. *Early, Williams* v. *Early* (1878), 16 Ch. D. 214, note (1), *per* HALL, V.-C., at p. 215), though the expression "further security" has been interpreted to do so (see *Stringer* v. *Harper* (1858), 26 Beav. 33). A security described as "collateral" may, nevertheless, in view of its covenants and other provisions, and the surrounding circumstances of the case, be held to be a complete, perfect, and independent security (*Re Athill, Athill* v. *Athill, supra*), though, where the words used by the parties, together with the facts of the case, indicate an intention to regard a particular security as "collateral," it will be so construed by the court (see *Bute* (*Marquess*) v. *Cunynghame* (1826), 2 Russ. 275; *Lipscomb* v. *Lipscomb* (1868), L. R. 7 Eq. 501; *De Rochefort* v. *Dawes* (1871), L. R. 12 Eq. 540). To describe a guarantee as a "collateral contract" does not sufficiently emphasise its accessory character, though it would seem the words "collateral security" might do so, as the word "security," even by itself, ordinarily means something auxiliary to an antecedent obligation (see *National Telephone Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 250, C. A., *per* A. L. SMITH, L.J., at p. 258). In the Stamp Act, 1891 (54 & 55 Vict. c. 39), however, the word "security" includes an instrument, whether under seal or not, by which an obligation to pay is originally created (*National Telephone Co.* v. *Inland Revenue Commissioners, supra*; affirmed, [1900] A. C. 1; *County of Durham Electrical Power Distribution Co., Ltd.* v. *Inland Revenue Commissioners* (1909), *Times*, 23rd February). As to the term "unilateral contract," see p. 448, *post*.

(*g*) See *Birkmyr* v. *Darnell* (1704), 1 Salk. 27; 1 Smith, L. C., 11th ed., p. 299; *Read* v. *Nash* (1751), 1 Wils. 305; *Gordon* v. *Martin* (1731), Fitz-G. 302, 303; *Kirkham* v. *Marter* (1819), 2 B. & Ald. 613, 616; *Re Albert Life Assurance Co., Ex parte Western Life Assurance Co.* (1870), L. R. 11 Eq. 164, 177; *Elkins* v. *Heart* (1731), Fitz-G. 202; and p. 460, *post*. A warranty is a "collateral undertaking" (see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.; *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, *per* Lord ABINGER, C.B., at p. 404), but, unlike a guarantee, it is not concerned with the solvency or fidelity of persons, but with the title, quantity, or quality of property sold. Sometimes a warranty must, like a guarantee (see p. 454, *post*), be in writing, signed by the party to be charged; see the Flax and Hemp Seed (Ireland) Act, 1810 (50 Geo. 3, c. 82).

(*h*) *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187, *per* Lord ABINGER, C.B., at p. 189; *Ansell* v. *Baker* (1850), 15 Q. B. 20; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.) 76; *Sharpe* v. *Gibbs* (1864), 16 C. B. (N. S.) 527; *White v. Cuyler* (1795), 6 Term Rep. 176.

(*i*) See pp. 563 *et seq.*, *post*; *Hastings Corporation* v. *Letton*, [1908] 1 K. B. 378; *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307. As to when the liability continues, notwithstanding the determination of the principal contract or liability, see *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464, C. A., and pp. 564, 566, 568 *et seq.*, *post*.

(*k*) As to continuing guarantees, see pp. 491 *et seq.*, *post*. The Indian Contract Act, 1872 (Act IX. of 1872), s. 129, defines a continuing guarantee as follows—namely, "A guarantee which extends to a series of transactions is called a 'continuing guarantee.'"

865. The creditor is the person secured by the contract of guarantee from possible loss due to and in respect of the debt, default, or miscarriages of the principal debtor (*l*).

Creditor.

866. The principal debtor (or principal) is the person primarily liable to the creditor for the debt, default, or miscarriages answered for by the surety (*m*).

Principal debtor.

The principal debtor, though sometimes bound by the same instrument as his surety, is not a party to the latter's contract to be answerable to the creditor: there is no privity between the surety and the principal debtor, and they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts (*n*).

Surety.

867. The surety (or guarantor) (*o*) is he who engages with the creditor of a third party to be answerable, in the second degree (*p*), for some debt, default, or miscarriages (*q*), for which such third

(*l*) As to the meaning of the words "debt, default, or miscarriages," see note (*s*), p. 455, *post*. The person to whom the guarantee is given is called "the creditor" (Indian Contract Act, 1872 (Act IX. of 1872), s. 126).

(*m*) As to the meaning of the words "debt, default, or miscarriages," see note (*s*), p. 455, *post*. "The person, in respect of whose default the guarantee is given, is called the 'principal debtor'" (Indian Contract Act, 1872 (Act IX. of 1872), s. 126). The same person cannot be creditor and principal debtor or surety, for no one can legally contract or covenant with himself (see *Ellis* v. *Kerr*, [1910] 1 Ch. 529).

(*n*) *Bain* v. *Cooper* (1841), 1 Dowl. (N. S.) 11, *per* PARKE, B., at p. 14; *Rawstone* v. *Parr* (1827), 3 Russ. 539, *per* Lord ELDON, L.C., at p. 541. Where, however, a party becomes surety to another under an instrument which in terms creates only a joint liability, then, in the absence of any proof to the contrary, the intention of the parties must be taken to be that the surety is only liable to the extent limited by the instrument, and does not become a surety out and out (*Other* v. *Iveson* (1855), 3 Drew. 177, *per* KINDERSLEY, V.-C., at p. 182; and see *Jones* v. *Beach* (1852), 2 De G. M. & G. 886; *Rawstone* v. *Parr*, *supra*; *Richardson* v. *Horton* (1843), 6 Beav. 185; *Strong* v. *Foster* (1855), 17 C. B. 201; *Pooley* *Harradine* (1857), 7 E. & B. 431; but compare *Thorpe* v. *Jackson* (1837), 2 Y. & C. (EX.) 553). In such circumstances, and also where two joint debtors subsequently agree, to the knowledge of the creditor, that one shall be surety only for the other (see *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586; *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207, H. L.; *Ashbee* v. *Pidduck* (1836), 1 M. & W. 564; see pp. 462, 505, 506, *post*), the suretyship created, while it obliges the creditor to respect the rights of the surety (*ibid.*), leaves the latter still a joint debtor though possessed of certain surety's rights. Cases of joint liability are outside the Statute of Frauds (29 Car. 2, c. 3), s. 4; see p. 461, *post*. A guarantee for the fidelity and good conduct of a servant, or clerk, or person in a confidential position is considered as being a contract by the employer, and the employed, and the surety on his behalf (*Burgess* v. *Eve* (1872), L. R. 13 Eq. 450, *per* MALINS, V.-C., at p. 457; and see *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, L.C., at p. 11.

(*o*) The existing rules of the Stock Exchange term the surety for a person seeking admission to the Stock Exchange a "recommender" (rr. 22, 26).

(*p*) The liability is "secondary" whenever the promise to be answerable for another leaves the latter primarily liable (*Mallet* v. *Bateman* (1865), L. R. 1 C. P. 163, Ex. Ch.). The primary liability need not, however, be legally enforced before having recourse to the surety unless the latter has so stipulated (see p. 488, *post*); and see *Johannesburg Municipal Council* v. *Stewart* (*D.*) *& Co.* (1902), *Ltd.*, (1909), 47 Sc. L. R. 20, H. L.; *Palmer* v. *Sheridan-Beckers* (1910), *Times*, 20th January.

(*q*) For the meaning of the words "debt, default, or miscarriages," see note (*s*), p. 455, *post*.

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party then is, or is intended to become, primarily liable to the creditor (*r*).

Different classes of suretyship.

868. There are three different kinds of suretyships, distinguishable as follows—namely, (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid (*s*).

Quasi-sureties.

The existence of such a primary and secondary liability does not of itself create the relation of principal and surety. So, though there is a primary and secondary liability between the transferor and transferee of shares (*t*), the relation between them is not that of principal and surety (*a*). Neither is the assignor of a lease a surety, in the true sense of the term, for the assignee thereof (*b*), nor is the mortgagor, who remains liable to the mortgagee, after selling the equity of redemption, a surety for the purchaser thereof (*c*).

Bill transactions.

Again, the acceptor of an accommodation bill cannot be regarded in the light of a surety for the payment by the drawer, so as to discharge the former by indulgence shown to the latter (*d*). On the other hand, however, the drawer of an accommodation note is, it

(*r*) A person often takes the position of surety from motives of friendship for the principal debtor, and, generally, not as the result of any distinct bargain between him and the creditor, or in consideration of any direct remuneration passing to him from the latter (*Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793; reversed, without reference to this point, *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135; and see *Ex parte Minet* (1807), 14 Ves. 189, *per* Lord ELDON, L.C., at p. 190). In an old Scottish case it was held to be *pactum illicitum* for the cautioner (the surety) to stipulate for a valuable consideration (*King* v. *Ker* (1711), 23 Mor. Dict. 9461); see p. 450, *post*, where the consideration for the surety's promise is dealt with. The Indian Contract Act, 1872 (Act IX. of 1872), s. 126, defines the surety as follows:—"The person who gives the guarantee is called the 'surety.'" A pledge or surety was, originally, but an animated gage, a hostage delivered over to slavery, but subject to redemption (see Pollock and Maitland's History of English Law before the Reign of Edward I., Vol. II., p. 184; and see also *ibid.*, pp. 189, 209).

(*s*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, L.C., at p. 11.

(*t*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (iii.); *Walker* v. *Bartlett* (1856), 18 C. B. 845.

(*a*) *Roberts* v. *Crowe* (1872), L. R. 7 C. P. 629; *Hudson's Case* (1871), L. R. 12 Eq. 1; *Re Barned's Bank*, *Helbert* v. *Banner* (1871), L. R. 5 H. L. 28.

(*b*) *Baynton* v. *Morgan* (1888), 22 Q. B. D. 74, C. A., *per curiam;* and see *Johns* v. *Pink*, [1900] 1 Ch. 296.

(*c*) See *Waring* v. *Ward* (1802), 7 Ves. 332, 337; *Re Errington*, *Ex parte Mason*, [1894] 1 Q. B. 11, 14.

(*d*) *Fentum* v. *Pocock* (1813), 5 Taunt. 192, *per* MANSFIELD, C.J., at p. 196; and as to nature of liability of acceptor, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 515.

seems, in the position of a surety, with all the surety's rights (*e*), while the drawer of an ordinary bill of exchange, though not strictly a surety for the acceptor (who is primarily liable), may be in the nature of a surety (*f*), and an indorser of a bill or note is certainly a surety for the payment thereof to the holder by the acceptor or maker (*g*), and is entitled as such to the rights of a surety (*h*), there being no distinction in this respect between the ordinary case of suretyship and that of suretyship arising out of a bill transaction (*i*).

Partnership.

A retired partner is in the position of a surety for the continuing members of the firm, after such retirement has been notified to the creditors (*k*).

Mortgage debt.

Persons who join in mortgage securities for the purpose of guaranteeing the payment of principal and interest, or of interest alone, and the performance of covenants entered into by the mortgagor are sureties, who, as such, are entitled as against the mortgagor, on payment of the mortgage debt in whole or in part, to a charge on the estate mortgaged (*l*), and to have the benefit of all the remedies and advantages which the mortgagee possessed against the mortgagor (*m*).

Conversion of debtor into surety, and *vice versâ*.

A person who was not originally a surety may be converted into one without the creditor's consent (*n*), while, on the other hand, a surety may be converted into a principal debtor (*o*), whereby he forfeits the rights he previously possessed as surety (*p*).

Contract of insurance.

869. A contract of insurance is one whereby the insurer (or underwriter as he is sometimes called) contracts absolutely to pay, in a certain event, and not only in case some other person should not pay (*q*).

(*e*) *Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372.

(*f*) *Ex parte Yonge* (1814), 3 Ves. & B. 31, *per* Lord ELDON, L.C., at p. 40.

(*g*) See *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; and see also *Clark* v. *Devlin* (1803), 3 Bos. & P. 363; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C.; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 55 (2); and title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 520.

(*h*) *Duncan, Fox & Co.* v. *North and South Wales Bank, supra.*

(*i*) *Ibid.*; and see *Forbes* v. *Jackson* (1882), 19 Ch. D. 615, *per* HALL, V.-C., at p. 622.

(*k*) *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586; and see title PARTNERSHIP.

(*l*) *Gedye* v. *Matson* (1858), 25 Beav. 310; *Allen* v. *De Lisle* (1856), 3 Jur. (N. S.) 928. As to whether such a charge requires registration under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1) (d), or any other enactment, see p. 513, *post*; and *Kennedy* v. *Campbell*, [1899] 1 I. R. 59.

(*m*) *Ibid.*; and see pp. 512 *et seq.*, *post.*

(*n*) *Rouse* v. *Bradford Banking Co.*, *supra*; *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207, H. L.; *Nisbet* v. *Smith* (1789), 2 Bro. C. C. 579; *Wilson* v. *Lloyd* (1873), 21 W. R. 507.

(*o*) An account stated by the original principal debtor and his surety to the creditor is some evidence of the conversion of the surety into a principal debtor (*Buck* v. *Hurst and Bailey* (1866), L. R. 1 C. P. 297), especially as the right of action, after an account stated, rests in general on the new promise to pay (*Re Laycock* v. *Pickles* (1863), 4 B. & S. 497).

(*p*) *Reade* v. *Lowndes* (1857), 23 Beav. 361; see pp. 557, 563, *post.*

(*q*) *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A., *per* Lord

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Indemnity.

870. An indemnity (*r*) is a contract, express or implied, to keep a person, who has entered into, or who is about to enter into, a contract or incur any other liability, indemnified against loss, independently of the question whether a third person makes default (*a*).

A promise of indemnity, when not made to a person to whom another is already or is to become liable, but to one who, in consideration of such promise, undertakes a liability, is not a guarantee within the Statute of Frauds (*b*). For a guarantee is a contract to indemnify the promisee on a contingency (*c*), while on the other hand the surety's liability is not a contingent debt (*d*).

Indemnity an original obligation.

The contract of indemnity, in its primary and popular sense, is substantially in the nature of an original obligation (*e*), and the mere fact that a particular agreement may terminate in a liability to pay the debt of another does not make it a guarantee, instead

ESHER, M.R., at p. 60; and see *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517. A document, though called a guarantee, may be in the nature of a policy of insurance against the happening of certain events (*Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138, *per* WARRINGTON, J., at p. 147). Contracts of insurance are generally matters of speculation, where the person insuring has means of knowledge as to the risk, which the insurer has not, and of which the latter must, therefore, be duly informed to enable him to fix his remuneration, while, on the other hand, guarantees are generally entered into by persons who well know what risk they undertake, without its being explained to them, and who, if they do not know it, should make inquiry on the subject (*Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793). Though the actual decision of the Court of Appeal in this case was reversed by the House of Lords (*Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135), this *dictum* of ROMER, L.J., remains unimpaired; see *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 188; and pp. 539 *et seq.*, *post*, where the question of what disclosures must be made to an intending surety is considered. As to evidence of intention to constitute a contract of insurance and not of guarantee, see note (*b*), p. 465, *post*. As to the contract of insurance generally, see title INSURANCE.

(*r*) Under the present title, indemnities other than those which are either guarantees within the Statute of Frauds (29 Car. 2, c. 3), s. 4, or else arise out of the contract of suretyship, are not specially dealt with. For detailed information concerning them, many special titles in this work, relating thereto, should be consulted; see, for example, titles AGENCY, Vol. I.; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II.; CLUBS, Vol. IV.; COMPANIES, Vol. V.; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI.; HUSBAND AND WIFE; INSURANCE; LANDLORD AND TENANT; MASTER AND SERVANT; MORTGAGE; PARTNERSHIP; REAL PROPERTY AND CHATTELS REAL; STOCK EXCHANGE; TORT; TRUSTS AND TRUSTEES.

(*a*) *Guild & Co.* v. *Conrad*, [1894] 2 Q. B. 885, C. A., *per* DAVEY, L.J., at p. 896; and see *Re Hoyle*, *Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, C. A.; *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton, supra*; *Wildes* v. *Dudlow* (1874), L. R. 19 Eq. 198. The Indian Contract Act, 1872 (Act IX. of 1872), s. 124, contains the following definition of an indemnity—namely, "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity."

(*b*) 29 Car. 2, c. 3, s. 4; see p. 461, *post*; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 784; *Guild & Co.* v. *Conrad, supra*; *Thomas* v. *Cook* (1828), 8 B. & C. 728; *Wildes* v. *Dudlow, supra*.

(*c*) *Sampson* v. *Burton* (1820), 4 Moore (C. P.), 515, *per curiam*.

(*d*) *Atkinson* v. *Grey* (1853), 1 Sm. & G. 577.

(*e*) See *Harburg India Rubber Comb Co.* v. *Martin*, *supra*.

of an indemnity, where such is not its immediate or main object (*f*). An indemnity is a valuable consideration (*g*).

The contract of marine insurance (*h*) and of fire insurance (*i*) is a contract of indemnity, but the contract of life insurance (*k*) and of re-insurance (*l*) is not.

Indemnity and repayment distinguished.

871. It is sometimes a question whether a particular contract is one of "indemnity," or one of "repayment," between which there is a well-known distinction (*m*), the former contract being more comprehensive than the latter (*n*).

Express indemnities.

872. Express indemnities are either created by the parties themselves (*o*) or by statute (*p*).

(*f*) *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 786; and see *Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285, C. A., and p. 460, *post*.

(*g*) *Worseley* v. *Demattos* (1758), 1 Burr. 467, *per* Lord MANSFIELD, at p. 474. Therefore, a surety to whom a lease or conveyance of land is made by way of indemnity is a purchaser for valuable consideration within the stat. (1571) 13 Eliz. c. 4, and such lease or conveyance is valid (*Scot* v. *Bell* (1672), 2 Lev. 70; *Beverly* v. *Gatacre* (1623), 2 Roll. Rep. 305).

(*h*) Marine Insurance Act, 1906 (6 Edw 7, c. 41), s. 1; *M'Cowan* v. *Baine, The Niobe*, [1891] A. C. 401, *per* Lord SELBORNE, at p. 403; *Pitman* v. *Universal Marine Insurance Co.* (1882), 9 Q. B. D. 192, C. A.; see, generally, title INSURANCE.

(*i*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 386, C. A.; *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226, C. A.

(*k*) *Dalby* v. *India and London Life Assurance Co.* (1854), 15 C. B. 365, Ex. Ch.

(*l*) *Nelson* v. *Empress Assurance Corporation*, [1905] 2 K. B. 281, C. A.

(*m*) *Potter* v. *London County Council* (1905), 70 J. P. 35, *per* Lord ALVERSTONE, C.J., at p. 36.

(*n*) *Ibid.*, where the contract was held to be one of repayment of damages, and not to cover costs of legal proceedings pending at the date thereof against the holder of the contract.

(*o*) The following are cases of express indemnities created by contract:—*Grylls* v. *Grylls, Mann* v. *Kendall* (1869), 18 W. R. 85; *Gray* v. *Lewis, Parker* v. *Lewis* (1873), 8 Ch. App. 1035; *Re Russell, Russell* v. *Shoolbred* (1885), 29 Ch. D. 254, C. A.; *Dunn* v. *Donald Currie & Co.* (1901), 6 Com. Cas. 118; *Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342; *Re Bolton* (1892), 8 T. L. R. 668; *Greenwood (John), Ltd.* v. *Hawkings* (1906), 23 T. L. R. 72; *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517, 522; *Draper* v. *Thompson* (1829), 4 C. & P. 84; *Hooper* v. *Bromet* (1904), 90 L. T. 234, C. A.; *Groom* v. *Bluck* (1841), 2 Man. & G. 567; *Toplis* v. *Grane* (1839), 5 Bing. (N. C.) 636; *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; *Atkins* v. *Revell* (1860), 1 De G. F. & J. 360, C. A.; *Croydon Rural District Council* v. *Sutton District Water Co.* (1907), 71 J. P. 513; affirmed (1908), 72 J. P. 217, C. A. The right to sue on a covenant to indemnify is property within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168; *Re Perkins, Poyser* v. *Beyfus*, [1898] 2 Ch. 182, C. A.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 137. As to a mortgagor's right on redemption to express indemnity in case of missing title deeds, see title MORTGAGE.

(*p*) Amongst the many statutes which confer an express right of indemnity are the following:—Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97); Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 111; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 333; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (2); Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 24, 45; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 1; and Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 4 (2), 6 (2), 7 (1) (f), 8. Where an accident, in respect of which an employer has been compelled to pay compensation under the last-named Act, is caused by the combined negligence of

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Invalid indemnities.

Express indemnities are not always permissible. Thus, it is contrary to public policy for a third person, or for the prisoner himself, to indemnify a bail in a criminal case (*q*), and the indemnity to the printers and publishers of a newspaper by the proprietors thereof in respect of claims against them, for any libel which may appear in the paper, cannot be legally enforced (*r*), though, on the other hand, sureties under an administration bond may be indemnified against the next of kin (*s*). A party to a contract cannot escape from his obligations thereunder by offering to give indemnity which is not that which the other contracting party agreed to accept (*t*). Indemnities against claims by third persons, which are of the most varied kinds (*u*), have always been allowed (*a*); and they are not invalid on the ground of maintenance, though involving and contemplating the institution or defence of an action, when given in the legitimate defence of business or commercial interests (*b*).

Implied indemnities.

873. An indemnity may also arise under an implied contract (*c*), or by reason of an obligation resulting from the relation of the

another person and of his own servants, the employer cannot maintain an action for indemnity against that other person under s. 6 of the Act (*Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.*, [1911] 1 K. B. 114, C. A.).

(*q*) *Consolidated Exploration and Finance Co.* v. *Musgrave*, [1900] 1 Ch. 37; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A. A surety for the appearance of an accused person to answer to a criminal charge by accepting an indemnity from the latter is guilty of an act tending to produce public mischief for which he is liable to prosecution (*R.* v. *Porter*, [1910] 1 K. B. 369, C. C. A.).

(*r*) *Smith* (*W. H.*) *& Son* v. *Clinton and Harris* (1908), 99 L. T. 840; see also p. 453, *post*.

(*s*) *Blake* v. *Bayne*, [1908] A. C. 371, P. C. It may be useful to mention that the existing rules of the Stock Exchange forbid sureties (who are termed "recommenders") for applicants for admission to the Stock Exchange to be indemnified (rr. 22, 24, 26); see title STOCK EXCHANGE.

(*t*) *Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A. C. 593, *per* Lord WATSON, at pp. 607 608.

(*u*) *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd.* [1908] 1 K. B. 1006, C. A., *per* FLETCHER MOULTON, L.J., at pp. 1014, 1015.

(*a*) *Ibid.*, at p. 1015. When money is borrowed by a receiver to enable him to carry on the business of a company in liquidation, he is not personally liable to the lenders, and has, therefore, no right of indemnity out of the assets of the company to which the principle of subrogation could apply (see *Re Boynton (A.), Ltd., Hoffman* v. *Boynton (A.), Ltd.*, [1910] 1 Ch. 519). For cases affording examples of implied indemnities, see note (*c*), *infra*.

(*b*) *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd., supra*, at p. 1012, where the indemnities held to be valid took the form of agreements by manufacturers to indemnify their customers against actions by rival manufacturers for using an apparatus manufactured by the givers of the indemnity.

(*c*) The following cases afford examples of implied contracts of indemnity, namely:—*Westropp* v. *Solomon* (1849), 8 C. B. 345; *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A.; *Jones* v. *Orchard* (1855), 16 C. B. 614; *Hardoon* v. *Belilios*, [1901] A. C. 118, P. C.; *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; *Broom* v. *Hall* (1859), 7 C. B. (N. S.) 503; *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196; *Re German Mining Co., Ex parte Chippendale* (1853), 4 De G. M. & G. 19, C. A.; *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307; *Krüger & Co., Ltd.* v. *Moel Tryvan Ship Co., Ltd.*, [1907] A. C. 272; *Lampleigh* v. *Brathwait* (1614), Hob. 105; 1 Smith, L. C., 11th ed., pp. 141 *et seq.*, and notes thereto; *Hancock* v. *Caffyn* (1832), 8 Bing. 358; *Burnett* v. *Lynch* (1826), 8 Dow. & Ry. (K. B.) 368; *Young* v. *Cole* (1837), 3 Bing. (N. C.) 724; *Matthews* v. *Ruggles-Brice*, [1911] 1 Ch. 194; *Draper* v. *Thompson* (1829), 4 C. & P. 84.

parties (*d*). Thus, a person who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him: this principle applies to many cases, and where a trust is for the benefit of the creator of the trust it may apply to a trustee (*e*).

Right of person exercising a legal duty erroneously to indemnity.

Where a person invested with either a statutory or common law duty, of a ministerial character, is called upon to exercise that duty, on the request, direction, or demand of another, and he, without any default on his part, acts in a manner which, though apparently legal, is, in fact, illegal, and a breach of the duty, thereby incurring liability to third persons, there is implied by law a contract, by the person making the request, to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty, and it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, nor could, with reasonable diligence, have discovered it (*f*).

Quasi-indemnities.

874. Akin to implied indemnities are those cases where necessaries are supplied to persons who, by reason of disability, cannot themselves contract in circumstances which would justify the court in inferring an obligation to repay the money spent upon them. In cases of this kind the law implies an obligation on the part of such persons to pay for the necessaries supplied out of their own property (*g*).

Where there is no implied right of indemnity.

875. The right to an implied indemnity is excluded by an express contract relating to the same subject-matter (*h*); for, where there is an express contract, the parties must be guided by it, and one party cannot relinquish it or abide by it as it may suit his convenience to do (*i*). Thus, the surety's implied right to be indemnified by the principal debtor is excluded by an express

Implied right of indemnity excluded by express contract.

(*d*) *Wynne* v. *Tempest*, [1897] 1 Ch. 110, *per* CHITTY, J., at p. 113. As a general rule, a change of *cestui que trust* does not release the original *cestui que trust* from the liability to indemnify the trustee (*Matthews* v. *Ruggles-Brice*, [1911] 1 Ch. 194). For various implied indemnities, see titles AGENCY, Vol. I., pp. 196, 197; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 502, 522; CLUBS, Vol. IV., p. 420; LANDLORD AND TENANT; MASTER AND SERVANT; MORTGAGE; TORT; TRUSTS AND TRUSTEES. For the procedure where the defendant in an action claims an indemnity, see title PRACTICE AND PROCEDURE; and for the costs in such cases, see title DAMAGES, Vol. X., p. 320.

(*e*) *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855, *per* Lord BLACKBURN, at p. 872.

(*f*) *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, *per* Lord DAVEY, at p. 399; and see *Bank of England* v. *Cutler*, [1908] 2 K. B. 208, C. A.; *Starkey* v. *Bank of England*, [1903] A. C. 114. A *bonâ fide* introduction by name of a person to a broker as one anxious to transfer stock at the Bank of England, without any direction, does not give rise to an indemnity by the introducer in favour of the broker (*Bank of England* v. *Cutler*, *supra*; and see *Evans* v. *Collins* (1844), 5 Q. B. 804).

(*g*) *Re Rhodes*, *Rhodes* v. *Rhodes* (1889), 44 Ch. D. 94, C. A.; and see *Re Clabbon* (*an Infant*), [1904] 2 Ch. 465. See also title INFANTS AND CHILDREN.

(*h*) See *Upton* v. *Fergusson* (1833), 3 Moo. & S. 88; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488.

(*i*) *Cutter* v. *Powell* (1795), 6 Term Rep. 320, *per* ASHHURST, J., at p. 325; 2 Smith, L. C., 11th ed., pp. 1, 6.

PART 1. Definitions and Classifications.

contract of indemnification between them (*j*). Moreover, there is no implied right of indemnity by a surety against a person who has agreed to indemnify the principal debtor in respect of the guaranteed debt (*k*).

Part II.—Requisites of a Guarantee.

SECT. 1.—*In General.*

Requisites.

876. The requisites of a guarantee, as of any other contract (*l*), are:—mutual assent of the parties thereto (*m*), capacity of the parties to contract (*n*), and consideration, actual or implied (*o*).

SECT. 2.—*Mutual Assent of the Parties.*

Mutual assent of parties.

877. Although the surety's promise to be answerable for another may not, in the first instance, involve any corresponding obligation on the part of the promisee (*p*), nevertheless, as the surety's promise does not bind him until the promisee has made it irrevocable by fulfilling the prescribed conditions (*q*), there is no real want of mutuality (*r*). Consequently, it is a misnomer to describe a guarantee as a "unilateral contract" (*s*), though it is sometimes so named (*t*).

Acceptance.

878. An offer to guarantee is not binding till its acceptance (*u*), which is a question of fact (*v*). Until acceptance it is revocable (*w*),

(*j*) *Toussaint* v. *Martinnant* (1787), 2 Term Rep. 100, *per* BULLER, J., at p. 105.

(*k*) See *Re Law Courts Chambers Co.* (1889), 61 L. T. 669; *Crafts* v. *Tritton* (1818), 8 Taunt. 365.

(*l*) See title CONTRACT, Vol. VII., pp. 341 *et seq.*, 354 *et seq.*, 383 *et seq.*

(*m*) See *infra*.

(*n*) See p. 450, *post*.

(*o*) See pp. 450 *et seq.*, *post*.

(*p*) *Stadt* v. *Lill* (1808), 9 East, 348; *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234, *per* BRAMWELL, B., at p. 238; and cases cited at p. 449, *post*, as examples of the implied acceptance of the surety's offer of guarantee.

(*q*) *Westhead* v. *Sproson* (1861), 6 H. & N. 728; *Glyn* v. *Hertel* (1818), 2 Moore (C. P.), 134; *Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; *Hartland* v. *Jukes* (1863), 1 H. & C. 667.

(*r*) *Ibid.*

(*s*) For the difference between the so-called "unilateral contract" and one that is "bilateral," see Holland, Elements of Jurisprudence, 11th ed., p. 284.

(*t*) *Wynne* v. *Hughes* (1873), 21 W. R. 628, *per* BRAMWELL, B., at p. 629.

(*u*) *M'Iver* v. *Richardson* (1813), 1 M. & S. 557; *Nash* v. *Spencer* (1896), 13 T. L. R. 78; *Symmons* v. *Want* (1818), 2 Stark. 371; *Mozley* v. *Tinkler* (1835), 1 Cr. M. & R. 692; *Gaunt* v. *Hill* (1815), 1 Stark. 10; *Morten* v. *Marshall* (1863), 2 H. & C. 305; *Jones* v. *Beach* (1852), 2 De G. M. & G. 886; *Sorby* v. *Gordon* (1874), 30 L. T. 528; *Newport* v. *Spivey* (1862), 7 L. T. 328; *Bank of Montreal* v. *Munster Bank* (1876), 11 I. R. C. L. 47; *Payne* v. *Ives* (1823), 3 Dow. & Ry. (K. B.) 664; *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Quinn* v. *Leathem*, [1901] A. C. 495.

(*v*) *Marsden & Son* v. *Capital and Counties Newspaper Co., Ltd.* (1901), 46 Sol. Jo. 11, C. A.

(*w*) *Offord* v. *Davies*, *supra*; *Pope* v. *Andrews* (1840), 9 C. & P. 564; and see

SECT. 2. Mutual Assent of the Parties.

and unless the offer contemplates an express acceptance (*a*) the acceptance may be implied (*b*). Thus, where a guarantee is given to enable a third person to obtain a supply of goods on credit, or advances of money, or an appointment to some office or employment, no other acceptance of the surety's offer is necessary than the subsequent supply of the goods (*c*), or the making of the advances (*d*), or the appointment to the office or employment (*e*).

Requisites of binding acceptance.

The acceptance, which must be given during the lifetime of the person making the offer (*f*), may be verbal or in writing (*g*) and should, where no limit of time is fixed, be given within a reasonable time (*h*).

The acceptance is valid though it take place on Sunday (*i*).

An acceptance must be absolute and unqualified (*k*), and, in case of alternative offers, it should be stated which is accepted (*l*).

When no contract even after offer has been accepted.

879. Even after acceptance, the parties to an alleged contract of guarantee are sometimes able to escape therefrom on the ground of want of mutual assent, occasioned by mistake, though there may have been no fraud or misrepresentation (*m*).

A party will not, however, be allowed to evade performance of a contract on any such ground by the simple statement that he has made a mistake (*n*).

Sheffield v. *Castleton* (*Lord*) (1700), 2 Vern. 393. As to revocation of offer, see, generally, title CONTRACT, Vol. VII., p. 347.

(*a*) See *Mozley* v. *Tinkler* (1835), 1 Cr. M. & R. 692; *Morten* v. *Marshall* (1863), 2 H. & C. 305; *Payne* v. *Ives* (1823), 2 Dow. & Ry. (K. B.) 664, *per* HOLROYD, J., at p. 668.

(*b*) *Pope* v. *Andrews* (1840), 9 C. & P. 564, 568.

(*c*) *Morrell* v. *Cowan* (1877), 7 Ch. D. 151, C. A.; *Mockett* v. *Ames* (1871), 23 L. T. 729; *Westhead* v. *Sproson* (1861), 6 H. & N. 728; *Jays, Ltd.* v. *Sala* (1898), 14 T. L. R. 461; *White* v. *Woodward* (1848), 5 C. B. 810.

(*d*) See *Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; *Glyn* v. *Hertel* (1818), 2 Moore (C. P.), 134; *Oldershaw* v. *King* (1857), 2 H. & N. 517, Ex. Ch.; *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L. R. 10 Eq. 467; *Mayhew* v. *Crickett* (1818), 2 Swan. 185, 193; *Chapman* v. *Sutton* (1846), 2 C. B. 634.

(*e*) See *Kennaway* v. *Treleavan* (1839), 5 M. & W. 498; *Lysaght* v. *Walker* (1831), 5 Bli. (N. S.) 1, H. L.; *Newbury* v. *Armstrong* (1829), 6 Bing. 201.

(*f*) *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463, C. A., *per* MELLISH, L.J., at p. 475; see, further, title CONTRACT, Vol. VII., pp. 347 *et seq.*

(*g*) *Warner* v. *Willington* (1856), 3 Drew. 523, 532.

(*h*) *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381; *Ramsgate Victoria Hotel Co.* v. *Montefiore, Same* v. *Goldsmid* (1866), L. R. 1 Exch. 109.

(*i*) *Norton* v. *Powell* (1842), 4 Man. & G. 42.

(*k*) See, generally, title CONTRACT, Vol. VII., p. 350; *Mozley* v. *Tinkler, supra*; *Morten* v. *Marshall, supra*; *Montreal Gas Co.* v. *Vasey*, [1900] A. C. 595, P. C.

(*l*) *Lever* v. *Koffler*, [1901] 1 Ch. 543.

(*m*) See titles CONTRACT, Vol. VII., p. 354; MISREPRESENTATION AND FRAUD; MISTAKE; see also *Gill* v. *M'Dowell*, [1903] 2 I. R. 463; *Webster* v. *Cecil* (1861), 30 Beav. 62; *Kensington Borough Council* v. *Willet* (1905), *Times*, 16th December; *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434, C. A.; *Falck* v. *Williams*, [1900] A. C. 176, P. C.; *Kingston* v. *Marshall and Marshall* (1901), *Times*, 6th February.

(*n*) *Tamplin* v. *James* (1880), 15 Ch. D. 215, C. A. *per* BAGGALLAY, L.J., at pp. 217, 218; and see *Small* v. *Currie* (1853), 2 Drew. 102, *per* KINDERSLEY, V.-C., at p. 114. Thus, a surety who signs a guarantee, which gives full effect to the intentions of the creditor, who, on the faith thereof, supplies goods to the principal debtor, cannot repudiate his liability by asserting that he (the surety) meant something which he has not stated, and that, though reliance was placed

SECT. 3. SECT. 3.—*Capacity of the Parties to Contract.*

Capacity of the Parties to Contract.

Essential to validity.

880. Capacity to contract (*o*) is as essential to the validity of a guarantee as it is to that of any other contract. Therefore a guarantee procured by duress cannot be enforced (*p*). So, a guarantee extorted from a wife, by threats of criminal proceedings against her husband, is voidable, even though enforceable according to the laws of the country where it was made (*q*).

Infants and children.

881. The guarantee of an infant is void and incapable of ratification (*r*).

In the case of a person, just of age, becoming surety for a parent, or for one standing *in loco parentis*, the transaction will not hold good unless the intending surety has independent advice and is a free agent (*a*). Each case, however, will be decided in reference to its special circumstances (*b*).

SECT. 4.—*Valuable Consideration* (*c*).

When consideration required.

882. Every guarantee, not under seal, must, like other simple contracts, be supported by a valuable consideration (*d*) : that is to

upon his actual statement, he will only be liable for what he meant (*Haymen* v. *Gover* (1872), 25 L. T. 903, 905); see also *De Brettes* v. *Goodman* (1855), 9 Moo. P. C. C. 466. Where a written agreement is in clear and unambiguous terms, a man cannot be heard to say that he misunderstood it (*Falck* v. *Williams*, [1900] A. C. 176, P. C.; *Small* v. *Currie* (1853), 2 Drew. 102, *per* KINDERSLEY, V.-C., at pp. 114, 115; see pp. 474 *et seq.*, *post*, and title MISTAKE), especially if it has been fully and properly explained to him, even if he had no independent advice on the subject and there is no fiduciary relation subsisting between the parties; see *Blake* v. *Bayne*, [1908] A. C. 371, P. C.

(*o*) See, generally, title CONTRACT, Vol. VII., pp. 341 *et seq.*

(*p*) *Small* v. *Currie*, *supra*, *per* KINDERSLEY, V.-C., at p. 114; and see *Bunbury* v. *Hibernian Bank*, [1908] 1 I. R. 261; *Howes* v. *Bishop*, [1909] 2 K. B. 390, C. A.; *Talbot* v. *von Boris* (1910), 27 T. L. R. 95; and title EQUITY, Vol. XIII., p. 19.

(*q*) *Kaufman* v. *Gerson*, [1904] 1 K. B. 591, C.A.; and see *Scott* v. *Scott* (1847), 11 I. Eq. R. 74; *Bayley* v. *Williams* (1864), 4 Giff. 638. As to a married woman becoming surety for her husband, see title HUSBAND AND WIFE.

(*r*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62); see title INFANTS AND CHILDREN.

(*a*) *Espey* v. *Lake* (1852), 10 Hare, 260; *Maitland* v. *Irving* (1846), 15 Sim. 437; *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 237; *Kempson* v. *Ashbee* (1874), 44 L. J. (CH.) 195, C. A.; *Smith* v. *Kay* (1859), 30 L. J. (CH.) 45, H. L.; *Bunbury* v. *Hibernian Bank*, *supra*; *Powell* v. *Powell*, [1900] 1 Ch. 243; and see also *Bainbrigge* v. *Browne* (1881), 18 Ch. D. 188. As to what is undue influence, see titles CONTRACT, Vol. VII., pp. 357 *et seq.*; EQUITY, Vol. XIII., pp. 17 *et seq.*; MISREPRESENTATION AND FRAUD.

(*b*) *Blake* v. *Bayne*, *supra*. See also *London and Westminster Loan and Discount Co., Ltd.* v. *Bilton* (1911), 27 T. L. R. 184, as to the presumption of parental influence; and title FRAUDULENT AND VOIDABLE CONVEYANCES, pp. 103 *et seq.*, *ante*.

(*c*) On this subject, so far as it affects contracts in general, see title CONTRACT, Vol. VII., pp. 383 *et seq.* What must be taken to constitute and determine a contract not under seal are the promise and the consideration (*Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A., *per* BRETT, M.R., at p. 563).

(*d*) *Barrell* v. *Trussell* (1811), 4 Taunt. 117; *Sheffield* v. *Castleton* (*Lord*) (1700), 2 Vern. 393; *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595, 600, 601; *Pillans and Rose* v. *Van Mierop and Hopkins* (1765), 3 Burr. 1664, 1666; *Jones* v. *Ashburnham* (1804), 4 East, 455, 463, 464; *Ex parte Gardom* (1808), 15 Ves. 286; *Boyd* v. *Moyle* (1846), 2 C. B. 644, 650; *French* v. *French* (1841), 2 Man. & G. 644; *Barber* v. *Fox* (1670), 2 Wms. Saund. 136, and notes thereto;

SECT. 4. Valuable Consideration.

say, the mere existence of the debt, default, or miscarriage of another person is not sufficient to support the surety's promise to the creditor (*e*), which must in all cases be founded on a new consideration (*f*), the failure of which entitles the surety to have his guarantee delivered up to be cancelled (*g*).

Requisites of consideration.

The consideration for the surety's promise does not move from the principal debtor, but from the creditor (*h*). It need not directly benefit the surety (*i*), though it may do so (*j*), and it may consist wholly of some advantage given to or conferred on the principal debtor by the creditor at the surety's request (*k*). Thus, the surety's promise often stipulates for a supply of goods (*l*) or an advance of money (*m*) to the principal debtor, or that the latter should be taken into the service or employment of the creditor (*n*). Or, the consideration may take the form of forbearance on the part of

Glover v. *Halkett* (1857), 2 H. & N. 487. Having regard to the cases cited in this note, it is remarkable that Lord WESTBURY should in *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200, at p. 219, have described a contract to give security for the debt of another as "a contract without consideration." What is meant, no doubt, is that the consideration for such a contract is not necessarily a direct benefit or advantage to the surety.

(*e*) 1 Wms. Saund., 6th ed., 211 c, note (l), and see *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291, 297, where it was held by PARKER, J., that the mere existence of an antecedent debt is not valuable consideration for a security given by a debtor.

(*f*) *Ibid.*; and see *French* v. *French* (1841), 2 Man. & G. 644; *Bell* v. *Welch* (1850), 9 C. B. 154; *Crofts* v. *Beale* (1851), 11 C. B. 172.

(*g*) *Cooper* v. *Joel* (1859), 1 De G. F. & J. 240; and see *Re Barber & Co., Ex parte Agra Bank* (1870), L. R. 9 Eq. 725; *Rolt* v. *Cozens* (1856), 18 C. B. 673; and p. 545, *post*.

(*h*) See *White* v. *Cuyler* (1795), 6 Term Rep. 176, 177; *Dutchman* v. *Tooth* (1839), 5 Bing. (N. C.) 577. The authorities for the doctrine that the consideration for a promise must move from the promisee do not cover a case in which the consideration is supplied by an agent who, nevertheless, obtains the promise for and on behalf of his principal; see *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, P. C.

(*i*) *Ex parte Minet* (1807), 14 Ves. 189, *per* Lord ELDON, L.C., at p. 190; *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793; reversed, without reference to this point, *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135; *Morley* v. *Boothby* (1825), 10 Moore (C. P.), 395, *per* BEST, C.J., at p. 406; *Nerot* v. *Wallace* (1789), 3 Term Rep. 17, *per* BULLER, J., at p. 24; *Bailey* v. *Croft* (1812), 4 Taunt. 611; *Ex parte Gardom* (1808), 15 Ves. 286; *Wright* v. *Sandars* (1857), 3 Jur. (N. S.) 504, *per* STUART, V.-C., at p. 507.

(*j*) *Re Willis* (1849), 4 Exch. 530.

(*k*) *Morley* v. *Boothby*, *supra*; see also *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A., *per* BOWEN, L.J., at p. 289.

(*l*) *Morrell* v. *Cowan* (1877), 7 Ch. D. 151, C. A.; *Wood* v. *Benson* (1831), 2 Cr. & J. 94; *Johnston* v. *Nicholls* (1845), 1 C. B. 251; *Boyd* v. *Moyle* (1846), 2 C. B. 644; *Mockett* v. *Ames* (1871), 23 L. T. 729; *White* v. *Woodward* (1848), 5 C. B. 810. The supply of goods should, it seems, be *bonâ fide* and to a reasonable extent (*Johnston* v. *Nicholls*, *supra*; *White* v. *Woodward*, *supra*), though, subject to this condition, the amount to be supplied is discretionary (*White* v. *Woodward*, *supra*).

(*m*) *Edwards* v. *Jevons* (1849), 8 C. B. 436; *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Grahame* v. *Grahame* (1887), 19 L. R. Ir. 249; *Mayhew* v. *Crickett* (1818), 2 Swan. 185; *Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; *Hartland* v. *Jukes* (1863), 1 H. & C. 667.

(*n*) See *Kennaway* v. *Treleavan* (1839), 5 M. & W. 498; *Montefiore* v. *Lloyd* (1863), 12 W. R. 83; *Newbury* v. *Armstrong* (1829), 6 Bing. 201; *Leathley* v. *Spyer* (1870), L. R. 5 C. P. 595; *Lysaght* v. *Walker* (1831), 5 Bli. (N. S.) 1, H. L.

SECT. 4. **Valuable Consideration.**

the creditor, at the surety's request, to sue the principal debtor (*o*) or of the actual suspension of pending legal proceedings against the latter (*p*). The mere fact of forbearance is not, however, a consideration for a person's becoming a surety for the payment of a debt (*q*), for there must be either an undertaking to forbear, or else an actual forbearance at the request, express or implied, of the surety (*r*). Forbearance for an indefinite period, provided it be the result of an express agreement, is a sufficient consideration to support a promise of a surety (*s*), and, where the length, in point of time, of the forbearance is not expressly prescribed, the parties are presumed to contemplate forbearance for a reasonable time (*t*). To be effectual, the forbearance relied upon must be of a right capable of being enforced (*a*). Therefore, where there is no person who could be sued for the debt agreed to be forborne, the forbearance cannot form any consideration (*b*).

Forbearance.

Non-essentials.

The consideration for the promise of the surety need not be co-extensive with the promise, for its mere inadequacy will not

(*o*) See *Rolt* v. *Cozens* (1856), 18 C. B. 673; *Crears* v. *Hunter* (1887), 19 Q. B. D. 341, 344, 346, C. A.; *Coles* v. *Pack* (1869), L. R. 5 C. P. 65; *Coe* v. *Duffield* (1822), 7 Moore (C. P.), 252; *Ockford* v. *Barrelli* (1871), 25 L. T. 504.

(*p*) *Payne* v. *Wilson* (1827), 7 B. & C. 423; *Oldershaw* v. *King* (1857), 2 H. & N. 517, Ex. Ch.; *Wynne* v. *Hughes* (1873), 21 W. R. 628; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A.; *Pullin* v. *Stokes* (1794), 2 Hy. Bl. 312, Ex. Ch. It was held in *Ross* v. *Moss* (1597), Cro. Eliz. 560, Ex. Ch., that the mere discontinuance of an action is not a sufficient consideration to support a promise. This case was disapproved of in *Harris* v. *Venables* (1872), L. R. 7 Exch. 235, where it was held that the withdrawal of a petition presented for winding up a company was a sufficient consideration to support a promise to pay the costs incurred of and in relation to such petition.

(*q*) *Crears* v. *Hunter*, *supra*, *per* Lord ESHER, M.R., at p. 344.

(*r*) *Crears* v. *Hunter*, *supra*, *per* LOPES, L.J., at p. 346; *Jones* v. *Ashburnham* (1804), 4 East, 455; *Miles* v. *New Zealand Alford Estate Co.*, *supra*, *per* COTTON, L.J., at pp. 283, 285, 286, *per* FRY, L.J., at p. 300. Where a surety, on being informed that proceedings were contemplated against himself and the principal debtor for a debt, stated, by letter, his intention to pay the debt, it was held, after the surety's death, that the letter was a promise to pay, and that the forbearance to sue was a sufficient consideration for such promise (*Jones* v. *Beach* (1851), 21 L. J. (CH.) 543). In an *assumpsit* founded on the collateral consideration of forbearance to sue another, there never was any need to show, in the pleadings, the origin or cause of the debt guaranteed (see *Therne* v. *Fuller* (1616), Cro. Jac. 396).

(*s*) Formerly forbearance *per paullulum tempus*, or for some time, was held to be a bad consideration (*Tilston* v. *Clarke* (1636), 1 Roll. Abr. 23, pl. 26; *Philips* v. *Sackford* (1595), Cro. Eliz. 455; *Semple* v. *Pink* (1849), 1 Exch. 74; *Elkins* v. *Heart* (1731), Fitz-G. 202; *Payne* v. *Wilson*, *supra*), except in those cases where a particular act had to be done, which required some time for the doing of it, and in which the law implied a reasonable time (*ibid.*), while, on the other hand, forbearance *per magnum tempus* (*Mapes* v. *Sidney* (1624), Cro. Jac. 683), or for a reasonable time (*Johnson* v. *Whitchcott* (1638), 1 Roll. Abr. 24, pl. 33), though equally indefinite in character, was upheld as good. In *Hoad* v. *Grace* (1861), 7 H. & N. 494, BRAMWELL, B., states at p. 497 that he is unable to understand how forbearance to press for immediate payment was ever held to mean forbearance to press for a reasonable time.

(*t*) See *Harris* v. *Venables*, *supra*; *Wynne* v. *Hughes*, *supra*; *Oldershaw* v. *King*, *supra*; *Barber* v. *Mackrell* (1892), 41 W. R. 341, C. A.; *Hoad* v. *Grace*, *supra*, at p. 497; *Alliance Bank* v. *Broom* (1864), 2 Drew. & Sm. 289; *Crears* v. *Hunter*, *supra*.

(*a*) *Jones* v. *Ashburnham*, *supra*, *per* Lord ELLENBOROUGH, at p. 463.

(*b*) *Ibid.*

render the guarantee *nudum pactum* (*c*). Neither need it be contemporaneous therewith (*d*), as it may consist of a compliance with some stipulated condition, which the creditor, without being bound to observe, must fulfil before the guarantee will attach (*e*). So the consideration may be entire (that is, given once and for all), or fragmentary (that is, supplied from time to time) and therefore divisible (*f*).

SECT. 4. Valuable Consideration.

The consideration for a promise of guarantee need not appear in writing (*g*).

883. Neither an illegal (*h*), nor a mere moral (*i*), nor a past or executed consideration (*j*) will support a guarantee. But where the language of the guarantee is equally expressive of a past or concurrent or a future consideration (*k*) for the surety's promise,

Insufficient consideration.

(*c*) *Johnston* v. *Nicholls* (1845), 1 C. B. 251, 271; see also *Pullin* v. *Stokes* (1794), 2 Hy. Bl. 312, Ex. Ch. Thus, the delivery up of an unenforceable guarantee may be a good consideration for the surety's promise (*Haigh* v. *Brooks* (1839), 10 Ad. & El. 309; and see *Westlake* v. *Adams* (1858), 5 C. B. (N. S.) 248; *Meredith* v. *Chute* (1702), 2 Ld. Raym. 759).

(*d*) See *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Butcher* v. *Steuart* (1843), 11 M. & W. 857.

(*e*) See *Kennaway* v. *Treleavan* (1839), 5 M. & W. 498, 501; *Westhead* v *Sproson* (1861), 6 H. & N. 728; *Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; and cases cited at p. 449, *ante*.

(*f*) *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A., *per* LUSH, L.J., at p. 319; and see *Baring* v. *Grieve* (1858), 6 W. R. 466; *Cannon* v. *Rands* (1870), 23 L. T. 817.

(*g*) See Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3; and see pp. 457, 468 *et seq.*, *post*.

(*h*) See *Wood* v. *Barker* (1865), L. R. 1 Eq. 139; *Coles* v. *Strick* (1850), 15 Q. B. 2. If the guarantee debt be itself illegal, it cannot be recovered from the surety under his guarantee (*Swan* v. *Bank of Scotland* (1836), 10 Bli. (N. S.) 627, H. L.). The stifling of a prosecution for a crime is an illegal consideration (*Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587; affirmed [1892] 1 Ch. 173, C. A.). However, an agreement to abstain from instituting such a threatened prosecution is not an illegal consideration unless there are reasonable grounds for believing that the illegal offence was actually committed, or unless each party entered into the agreement on that assumption (*Rourke* v. *Mealy* (1878), 4 L. R. Ir. 166). A guarantee which amounts to a fraudulent preference cannot be enforced, and will be ordered to be delivered up to be cancelled, even to a *particeps criminis* (see *Jackman* v. *Mitchell* (1807), 13 Ves. 581), while a guarantee given to one of several creditors, without the knowledge of the rest, to induce him to sign a composition deed, is a fraud on the rest of the creditors and void (*Coleman* v. *Waller* (1829), 3 Y. & J. 212). A promise to indemnify against the publication of a libel is bad and cannot be enforced (*Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634; *Hopton* v. *Licensed Victuallers Gazette* (1900), *Times*, 2nd November; *Colburn* v. *Patmore* (1834), 1 Cr. M. & R. 73; and see *Smith* (*W. H.*) *& Son* v. *Clinton and Harris* (1908), 99 L. T. 840), and it is illegal, and contrary to public policy, either for a third person to indemnify a bail in a criminal case (*Consolidated Exploration and Finance Co.* v. *Musgrave*, [1900] 1 Ch. 37), or for the prisoner himself to do so (*ibid.*); see also *R.* v. *Porter*, [1910] 1 K. B. 369, C. C. A.; *Jones* v. *Orchard* (1855), 16 C. B. 614; *Cripps* v. *Hartnoll* (1863), 4 B. & S. 414; *Green* v. *Cresswell* (1839), 10 Ad. & El. 453; *Wildes* v. *Dudlow* (1874), L. R. 19 Eq. 198; *Dann* v. *Curzon* (1910), 27 T. L. R. 163; and p. 461, *post*.

(*i*) *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438.

(*j*) See *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291.

(*k*) See *Bell* v. *Welch* (1850), 9 C. B. 154; *Eastwood* v. *Kenyon*, *supra*; *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Mockett* v. *Ames* (1871), 23 L. T. 729; *Chalmers* v. *Victors* (1868), 18 L. T. 481; *Wood* v. *Priestner* (1867), L. R. 2 Exch. 66, 282, Ex. Ch.; and see *Raikes* v. *Todd* (1838), 8 Ad. & El. 846.

SECT. 4. Valuable Consideration

Antecedent debt.

the maxim *ut res magis valeat quam pereat* applies (*l*), and parol evidence will, if necessary, be admitted to clear up the ambiguity (*m*). The mere existence of an antecedent debt is not of itself valuable consideration for a security given by the debtor (*n*), although it appears that such a debt is a sufficient consideration for a cheque or other negotiable security given on account of such debt. In such a case the negotiable security is equivalent to payment of the debt (*o*). In the case of a promissory note given by a principal and a surety for a definite sum, and payable on a fixed day, it is presumed to be given in consideration of an advance at the date of the note, and if the creditor insists, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal and the creditor, the burden of proof lies on the latter (*p*).

Part III.—Proof of a Guarantee.

SECT. 1.—*Statutory Provisions.*

The Statute of Frauds.

884. The Statute of Frauds (*q*) provides that no action shall be brought upon any special promise (*r*) to answer for the debt,

(*l*) *Steele* v. *Hoe* (1849), 14 Q. B. 431; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Edwards* v. *Jevons* (1849), 8 C. B. 436; *Colbourn* v. *Dawson* (1851), 10 C. B. 765; *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309; *Mockett* v. *Ames* (1871), 23 L. T. 729; *Grahame* v. *Grahame* (1887), 19 L. R. Ir. 249; *Johnston* v. *Nicholls* (1845), 1 C. B. 251; *Wood* v. *Priestner* (1867), L. R. 2 Exch. 66, 282, Ex. Ch.; *Chapman* v. *Sutton* (1846), 2 C. B. 634; *Ex parte Littlejohn* (1843), 3 Mont. D. & De G. 182.

(*m*) See *Hoad* v. *Grace* (1861), 7 H. & N. 494; *Wood* v. *Priestner, supra; Edwards* v. *Jevons, supra; Goldshede* v. *Swan, supra;* see also *Brunning* v. *Odhams Brothers, Ltd.* (1896), 75 L. T. 602, H. L.; *Bainbridge* v. *Wade* (1850), 16 Q. B. 89; *Shortrede* v. *Cheek* (1834), 1 Ad. & El. 57; *Johnston* v. *Nicholls, supra.*

(*n*) *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291, where, however, the security given was not a negotiable security; compare *Currie* v. *Misa* (1875), L. R. 10 Exch. 153, Ex. Ch., cited in note (*o*), *infra.*

(*o*) *Currie* v. *Misa, supra*, affirmed on another ground *sub nom. Misa* v. *Currie* (1876), 1 App. Cas. 554, where it was laid down that all moneys paid into a bank are subject to a lien, and that all documents as well as moneys deposited with a banker are subject on the banker's part to a lien in respect of any balance that may be due to him from his customer (*ibid., per* Lord HATHERLEY, at p. 569). In this case, which was not cited in *Wigan* v. *English and Scottish Law Life Assurance Association, supra*, it was not really necessary to decide whether an existing debt constitutes a sufficient consideration for the giving of the security, as there was ample consideration between the holders of the security (a cheque) sued upon and the drawer thereof. See also titles BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 497; CONTRACT, Vol. VII., p. 386.

(*p*) *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L. R. 10 Eq. 467.

(*q*) 29 Car. 2, c. 3, s. 4, throughout this title frequently referred to as "the statute." The common law of England did not require any written evidence of a guarantee, which could, accordingly, originally be proved in the same manner as any other contract (*Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754, *per* Lord BLACKBURN, at p. 768). To prevent, however, the danger of a guarantee being established by false evidence, or by evidence of loose talk, when it was never meant really to make such a contract, the English legislature intervened (*ibid.*).

(*r*) The term "special promise" excludes implied promises arising by

default, or miscarriages (*s*) of another person (*t*), unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith (*u*), or some other person thereunto by him lawfully authorised (*a*).

operation of law (*Gray* v. *Hill* (1826), Ry. & M. 420); contracts under seal or of record (*Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361, *per* WILLES, J., at pp. 368, 369), and also liabilities for deceitful representation, whereby credit has been obtained for a third party (to remedy this the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6, was passed (see note (*q*), p. 456, *post*); *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; notes to *Chandelor* v. *Lopus* (1603), 2 Smith, L. C., 11th ed., pp. 57 *et seq.*). Whether a "special promise" is or is not within the enactment does not depend on the consideration for the promise, but on other matters (*Fitzgerald* v. *Dressler* (1859), 7 C. B. (N. S.) 374, *per* COCKBURN, C.J., at p. 392; *Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285, C. A., *per* Lord ESHER, M.R., at p. 289; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, 788, C. A.; notes to *Forth* v. *Stanton* (1668), 1 Wms. Saund., 6th ed., 211 c, note (b)); though a different view on this subject has been expressed (see *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595, 600, 601). A special promise is sometimes partly within the enactment and partly outside it. When this occurs, and the promise is not reduced to writing, if the parts are separable, the part outside the enactment may give rise to an action (see *Wood* v. *Benson* (1831), 2 Cr. & J. 94; and see *Bromley* v. *Smith*, [1909] 2 K. B. 235); while if the parts are inseparable no action will lie in respect of either part (see *Chater* v. *Beckett* (1797), 7 Term Rep. 201; *Lexington (Lord)* v. *Clarke* (1690), 2 Vent. 223; *Thomas* v. *Williams* (1834), 10 B. & C. 664; *Falmouth (Earl)* v. *Thomas* (1832), 1 Cr. & M. 89; *Wood* v. *Benson*, *supra*; *Head* v. *Baldrey* (1837), 6 Ad. & El. 459; *Savage* v. *Canning* (1867), 16 W. R. 133).

(*s*) The plural of the word "miscarriage" is used in this section (see Statutes of the Realm). Each of the words "debt, default, or miscarriages" has a different signification (*Kirkham* v. *Marter* (1819), 2 B. & Ald. 613, *per* ABBOTT, C.J., at p. 616). Thus, the word "debt" (an illegal debt cannot be the subject of a guarantee (see *Swan* v. *Bank of Scotland* (1836), 10 Bli. (N. S.) 627, H. L.)) refers to a contractual liability already incurred (*Castling* v. *Aubert* (1802), 2 East, 325, *per* Lord ELLENBOROUGH, C.J., at pp. 330, 331); the word "default" (which apart from its statutory signification is a purely relative term, just like negligence, meaning nothing more, nothing less, than not doing what is reasonable under the circumstances, not doing something which one ought to do, having regard to the relations which he occupies towards other persons interested in a particular transaction (*Re Young and Harston's Contract* (1885), 31 Ch. D. 168, C. A., *per* BOWEN, L.J., at p. 174)) refers to such a liability *in futuro* (*ibid.*; and see *Mountstephen* v. *Lakeman* (1871), L. R. 7 Q. B. 196, Ex. Ch., *per* WILLES, J., at p. 202); and possibly to any future liability, whether founded in contract or not (*Kirkham* v. *Marter*, *supra*, *per* HOLROYD, J., at p. 617); while the word "miscarriages" comprehends that species of wrongful act for the consequences of which the law would make a person civilly responsible (*Kirkham* v. *Marter*, *supra*, *per* ABBOTT, C.J., at p. 616); though, probably, it and the word "default" equally apply to a promise to answer for another, with respect to the non-performance of a duty, even where such duty is not founded upon a contract (*Kirkham* v. *Marter*, *supra*, *per* HOLROYD, J., at p. 617).

(*t*) The words "of another person" mean that, to make it apply, there must always be a principal debtor in existence, or in contemplation, for whom the surety is, or is to become, answerable to the creditor (*Lakeman* v. *Mountstephen* (1874), L. R. 7 H. L. 17, *per* Lord SELBORNE at pp. 24, 25; as to this, see pp. 458 *et seq.*, *post*).

(*u*) See *Laythoarp* v. *Bryant* (1836), 2 Bing. (N. C.) 735.

(*a*) Statute of Frauds (29 Car. 2, c. 3), s. 4. For principles determining what is a guarantee within this enactment, see pp. 458 *et seq.*, *post*; and for what written evidence of guarantee will satisfy the enactment, see pp. 464 *et seq.*, *post*.

SECT. 1. Statutory Provisions.

The Statute of Frauds, s. 4, a provision as to evidence.

885. The above enactment is a mere enactment as to evidence (*b*). Where the original written evidence of a guarantee is lost, parol evidence of its having existed is admissible (*c*). Moreover, a payment of money into court by a defendant to an action on a guarantee dispenses with the production of written evidence of the contract (*d*), and admits the existence of an enforceable contract (*e*), unless the Statute of Frauds be at the same time pleaded (*f*). So, also, a plea of tender dispenses with written proof of a guarantee (*g*). Moreover, a person who, by fraud, prevents the reduction into writing of a guarantee cannot take advantage of such fraud (*h*).

Effect of verbal guarantee.

886. A verbal guarantee, though it cannot be enforced by action, is not, on that account, void (*i*): thus, money actually paid under it cannot, it seems, be recovered (*k*), and it may be used as a defence (*l*). When given by a solicitor it may be enforced against him by the court, by virtue of its summary jurisdiction over its officers (*m*). On the other hand, an executor or administrator cannot retain a debt owing in respect of a verbal guarantee (*n*), and, should he pay such a debt, would commit a *devastavit* (*o*). A verbal guarantee made abroad, and binding there, cannot be enforced in England by an action, since the mode of proof is governed by the *lex fori* (*p*).

The Statute of Frauds Amendment Act, 1828.

887. By the Statute of Frauds Amendment Act, 1828 (*q*), no representations as to the character, conduct, credit, ability, trade,

(*b*) See *Fraser* v. *Pape* (1904), 91 L. T. 340, C. A.; *Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, C. A., *per* LINDLEY, L.J., at p. 97; *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1; *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357, C. A.; see p. 468, *post*.

(*c*) *Barrass* v. *Reed* (1898), *Times*, 28th March; *Crays Gas Co.* v. *Bromley Gas Consumers Co.* (1901), *Times*, 23rd March.

(*d*) *Middleton* v. *Brewer* (1790), Peake, 20 [15]; *Spurrier* v. *Fitzgerald* (1801), 6 Ves. 548.

(*e*) *Lucas* v. *Dixon*, *supra*.

(*f*) *Ibid.* As to the necessity of pleading the Statute of Frauds, see title PLEADING; and compare title COUNTY COURTS, VOL. VIII., p. 485.

(*g*) See 1 Wms. Saund. (1871 ed.), p. 52; *Middleton* v. *Brewer*, *supra*.

(*h*) *Whitechurch* v. *Bevis* (1789), 2 Bro. C. C. 559, *per* Lord THURLOW, L.C., at pp. 564, 565; and see *Chattock* v. *Muller* (1878), 8 Ch. D. 177; *Lincoln* v. *Wright* (1859), 4 De G. & J. 16, C. A.; *Davies* v. *Otty* (No. 2) (1865), 35 Beav. 208; *Haigh* v. *Kaye* (1872), 7 Ch. App. 469; *Booth* v. *Turle* (1873), L. R. 16 Eq. 182; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.; compare *Brunning* v. *Odhams Brothers, Ltd.* (1896), 75 L. T. 602, H. L. In *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch., principals were held liable for the fraud of their agent, who, acting in the course of his business and for their benefit, gave a guarantee which he knew and intended to be unavailing. Had the agent been acting for his own personal benefit in this case, it seems, his principals would not have been held liable (see *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.).

(*i*) See title CONTRACT, Vol. VII., p. 362.

(*k*) *Shaw* v. *Woodcock* (1827), 7 B. & C. 73; and see *Cresswell* v. *Wood* (1839), 10 Ad. & El. 460; *Sweet* v. *Lee* (1842), 3 Man. & G. 452.

(*l*) See *Lavery* v. *Turley* (1860), 6 H. & N. 239.

(*m*) *Re Greaves* (1827), 1 Cr. & J. 374, n.; and see *Evans* v. *Duncombe* (1831), 1 Cr. & J. 372; *Re a Solicitor* (1900), 45 Sol. Jo. 104; and see, generally, title SOLICITORS.

(*n*) *Re Rownson, Field* v. *White* (1885), 29 Ch. D. 358, C. A.; and see *Midgley* v. *Midgley*, [1893] 3 Ch. 282, C. A.

(*o*) *Ibid.*; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 251, 258.

(*p*) *Leroux* v. *Brown* (1852), 12 C. B. 801. See titles CONFLICT OF LAWS, Vol. VI., p. 307; EVIDENCE, Vol. XIII., p. 420.

(*q*) 9 Geo. 4, c. 14 (commonly known as "Lord Tenderden's Act"); see *Lyde*

SECT. 1. Statutory Provisions.

or dealings of any other person (*r*) in order to obtain him credit can be sued on unless in writing (*s*). The representation must, to render the person who makes it liable, be to his knowledge untrue, and made with intention to induce another to act upon it, who does so and thereby sustains damage (*t*).

Requisites to bring representation within the statute.

The representation relied on must be signed by the party to be charged. An agent's signature is not sufficient, even in the case of a company in whose interest a representation is made (*a*). Where there are both written and verbal representations an action lies, if the written representations materially induced the person to whom they were made to give credit (*b*).

The Mercantile Law Amendment Act, 1856, s. 3.

888. By the Mercantile Law Amendment Act, 1856 (*c*), no special promise to answer for the debt, default, or miscarriage of another person, if in writing and properly signed by the party to be charged therewith, is deemed invalid to support an action, by reason only that the consideration for such promise does not appear in writing nor by necessary inference from a written document (*d*).

v. *Barnard* (1836), 1 M. & W. 101, *per* PARKE, B., at p. 114. It was passed owing to a successful evasion of the Statute of Frauds (29 Car. 2, c. 3), s. 4, which took the form of treating the surety's verbal promise to be answerable for another as a false representation, for which he was made liable in tort though not in contract (see *Lyde* v. *Barnard*, *supra*, *per* PARKE, B.; *Tatton* v. *Wade* (1856), 18 C. B. 371, Ex. Ch., *per* POLLOCK, C.B., at p. 381; *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 2 Smith, L. C., 11th ed., p. 66; *Ex parte Carr* (1814), 3 Ves. & B. 108, *per* Lord ELDON, L.C., at p. 110).

(*r*) Misrepresentation by one partner as to the credit of his firm is within the above enactment (*Devaux* v. *Steinkeller* (1839), 6 Bing. (N. C.) 84). See, further, as to what representations are within the enactment, notes to *Chandelor* v. *Lopus* (1603), 2 Smith, L. C., 11th ed., 54, 57 *et seq.*; *Swann* v. *Phillips* (1838), 8 Ad. & El. 457; *Turnley* v. *Macgregor* (1843), 6 Man. & G. 46; *Lyde* v. *Barnard*, *supra*; *Swift* v. *Winterbotham* (1873), L. R. 8 Q. B. 244; *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A.

(*s*) An unsuccessful attempt to evade this enactment (9 Geo. 4, c. 14, s. 6) was made in *Haslock* v. *Fergusson* (1837), 7 Ad. & El. 86. Evasions of s. 4 of the Statute of Frauds (29 Car. 2, c. 3) are discouraged by the courts (*Mallet* v. *Bateman* (1865), L. R. 1 C. P. 163, Ex. Ch., *per* POLLOCK, C.B., at pp. 170, 171).

(*t*) See *Behn* v. *Kemble* (1859), 7 C. B. (N. S.) 260; *Pasley* v. *Freeman*, *supra*; and see *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, *per* Lord SELBORNE, L.C., at p. 190. Only statements going to an assurance of personal credit are, it seems, within the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14) (see *Clydesdale Bank* v. *Paton*, [1896] A. C. 381; Pollock on Torts, 4th ed., p. 279). Where a banker is asked for a reference as to the standing and financial position of a customer, he need not make inquiries outside, as to the solvency or otherwise of the person asked about, nor do anything more than answer the question put to him honestly from what he knows from the books and accounts before him (*Parsons* v. *Barclay & Co.* (1910), 103 L. T. 196, C. A.).

(*a*) *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301, Ex. Ch.; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A.; and see *Williams* v. *Mason* (1873), 28 L. T. 232; *Hyde* v. *Johnson* (1836), 2 Bing. (N. C.) 776.

(*b*) *Tatton* v. *Wade* (1856), 18 C. B. 371, 381, Ex. Ch.

(*c*) 19 & 20 Vict c. 97.

(*d*) *Ibid.*, s. 3; see, further, p. 468, *post*. This enactment, which does not dispense with the existence of a consideration (see p. 468, *post*), was rendered necessary by reason of its having been decided that, as the language of s. 4 of the Statute of Frauds (29 Car. 2, c. 3) required "the agreement" to be in writing, this must be taken to comprise both the promise and also the consideration for it (*Wain* v. *Warlters* (1804), 5 East, 10; 1 Smith, L. C., 11th ed., p. 323; *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595), which together constitute an agreement not under seal (see *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A., *per* BRETT, M.R., at p. 563).

SECT. 2. Guarantees within the Statutory Provisions.

SECT. 2.—*Guarantees within the Statutory Provisions.*

Requisites for application of Statute of Frauds, s. 4.

889. To bring a case within s. 4 of the Statute of Frauds (*e*) the primary liability of another person to the promisee for the debt, default, or miscarriages to which the promise of guarantee relates must exist or be contemplated (*f*), otherwise the statute does not apply, and the promise is then valid and can be sued on, though not in writing.

The mere existence of a third person's liability is usually sufficient of itself to bring a surety's promise within the statute (*g*), except where such liability is not the immediate object of the contract, but is a mere incident thereof (*h*).

In order to bring a case within the statute it is not necessary that the principal debtor's liability should precede the surety's promise to be answerable (*i*); where it does not do so, however, it is generally more difficult to decide to whom credit is given, a question which then

This construction, however, imposed a grievance on the mercantile community (1 Wms. Saund. (1871 ed.) p. 227; 1 Smith, L. C., 11th ed., p. 304), and was found, in practice, to lead to many unjust and merely technical defences to actions on guarantees (1 Smith, L. C., 11th ed., p. 332).

(*e*) 29 Car. 2, c. 3.

(*f*) This is the primary and main principle for testing whether the statute applies to a particular case (see, generally, *Birkmyr* v. *Darnell* (1704), 2 Ld. Raym. 1085; 1 Smith, L. C., 11th ed., p. 299; *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438, *per* DENMAN, C.J., at p. 446; *Hargreaves* v. *Parsons* (1844), 13 M. & W. 561, *per* PARKE, B., at p. 570: *Mountstephen* v. *Lakeman* (1874), L. R. 7 H. L. 17, 24, 25; *Tomlinson* v. *Gill* (1756), Amb. 330; *Kirkham* v. *Marter* (1819), 2 B. & Ald. 613; *Lexington (Lord)* v. *Clarke* (1690), 2 Vent. 223). For the four other principles for testing whether a particular promise is within s. 4 of the Statute of Frauds (29 Car. 2, c. 3), and not actionable unless in writing, see pp. 461—464, *post*.

(*g*) See *Matson* v. *Wharam* (1787), 2 Term Rep. 80, *per* BULLER, J., at p. 81; *Anderson* v. *Hayman* (1789), 1 Hy. Bl. 120; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 784; *Colman* v. *Eyles* (1817), 2 Stark. 62; *Tomlinson* v. *Gell* (1837), 6 Ad. & El. 564; *Gull* v. *Lindsay* (1849), 4 Exch. 45; *Chater* v. *Beckett* (1797), 7 Term Rep. 201; *Barber* v. *Fox* (1816), 1 Stark. 270; *Beard* v. *Hardy* (1901), 17 T. L. R. 633, C. A. Where, however, a person certifies that another is able to pay for goods, to be supplied to the latter's order, he does not incur any liability for the latter's default (*Block* v. *Cox and Dodd* (1860), 2 L. T. 517); nor does a solicitor incur liability for his client by writing to the latter's creditor that he (the solicitor) is making arrangements for a loan to his client, and that if the creditor will hold a bill for a few days, he (the solicitor) will be prepared on the client's behalf to take it up (*Allaway* v. *Duncan* (1867), 16 L. T. 264; and see *Jones* v. *Beach* (1852), 2 De G. M. & G. 886; *Dixon* v. *Broomfield* (1814), 2 Chit. 205). However, one who covenants for the act of another is, it seems, personally bound by his covenant, though he describe himself in the deed as covenanting for, and on the part and behalf of, such other person (*Appleton* v. *Binks* (1804), 5 East, 148; *Re Bentley, Ex parte Bentley* (1833), 2 Deac. & Ch. 578).

(*h*) See p. 463, *post*; *Harburg India Rubber Comb Co.* v. *Martin*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 786; *Sutton & Co.* v. *Grey* (1893), 69 L. T. 354, *per* BOWEN, L.J., at p. 355; affirmed, [1894] 1 Q. B. 285, C. A.

(*i*) *Matson* v. *Wharam*, *supra*; and see *Jones* v. *Cooper* (1774), 1 Cowp. 227; *Peckham* v. *Faria* (1781), 3 Doug. (K. B.) 13; *Anderson* v. *Hayman* (1789), 1 Hy. Bl. 120. Formerly it was thought that, to bring a case within s. 4 of the Statute of Frauds (29 Car. 2, c. 3), it was essential that the principal debtor's liability should precede that of the surety (*Mawbrey* v. *Cunningham* (1773), cited 2 Term Rep. at p. 81; *Jones* v. *Cooper*, *supra*, *per* Lord MANSFIELD, C.J., at p. 228).

becomes one to be determined by evidence (*k*). Where no third party is liable the statute does not apply, as, for instance, where the promise extinguishes the third party's liability (*l*); or where the transaction between the parties amounts to a novation of a debt (*m*), the release of the original debt being, as it usually is in such a case (*n*), the consideration for the contract; or where there is a novation of a contract (*o*); or where there is a promise to pay rent in arrear, in consideration of the landlord not distraining (*p*), or after distress has been levied (*q*).

Guarantees outside the statute.

A guarantee for an infant is, it seems, outside the statute, where it is legally impossible for him to incur personal liability (*r*)

A guarantee for a married woman is within the statute in all cases where she is personally liable (*s*), and probably also where she is not so liable (*t*).

(*k*) See *Birkmyr* v. *Darnell* (1704), 2 Ld. Raym. 1085; 1 Smith, L.C., 11th ed., p. 299; *Mountstephen* v. *Lakeman* (1871), L. R. 7 Q. B. 196, 202, Ex. Ch.; affirmed (1874), L. R. 7 H. L. 17; *Gordon* v. *Martin* (1731), Fitz-G. 302; *Beard* v. *Hardy* (1901), 17 T. L. R. 633; *Smith* v. *Rudhall* (1862), 3 F. & F. 143; *Simpson* v. *Penton* (1834), 2 Cr. & M. 430; *Keate* v. *Temple* (1797), 1 Bos. & P. 158; *Rains* v. *Storry* (1827), 3 C. & P. 130; *Croft* v. *Smallwood* (1793), 1 Esp. 121; *Anderson* v. *Hayman* (1787), 1 Hy. Bl. 120; *Darnell* v. *Tratt* (1825), 2 C. & P. 82; *Austen* v. *Baker* (1698), 12 Mod. Rep. 250. Reference to book-keeping entries will sometimes indicate to whom credit was given (see *Austen* v. *Baker*, *supra*; *Storr* v. *Scott* (1833), 6 C. & P. 241).

(*l*) See *Goodman* v. *Chase* (1818), 1 B. & Ald. 297; *Butcher* v. *Steuart* (1843), 11 M. & W. 857; *Re Lendon*, *Ex parte Lane* (1846), De G. 300; *Lane* v. *Burghart* (1841), 1 Q. B. 933; *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Maggs* v. *Ames* (1828), 4 Bing. 470.

(*m*) *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313, P. C.; *Anstey* v. *Marden* (1804), 1 Bos. & P. (N. R.) 124; *Hodgson* v. *Anderson* (1825), 5 Dow. & Ry. (K. B.) 735; *Re Lendon*, *Ex parte Lane*, *supra*; and see *Wilson* v. *Coupland* (1821), 5 B. & Ald. 228; *Fairlie* v. *Denton* (1828), 2 Man. & Ry. (K. B.) 353; *Lacy* v. *M'Neile* (1824), 4 Dow. & Ry. (K. B.) 7.

(*n*) *Re Errington*, *Ex parte Mason*, [1894] 1 Q. B. 11, *per* VAUGHAN WILLIAMS, J., at p. 14.

(*o*) *Browning* v. *Stallard* (1814), 5 Taunt. 450; and see *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, *per* Lord SELBORNE, L.C., at p. 351.

(*p*) As the goods are, in such case, in the place of the debtor (*Williams* v. *Leaper* (1766), 2 Wils. 308; and see *Bampton* v. *Paulin* (1827), 4 Bing. 264).

(*q*) The reason for this is, that so long as the landlord holds the goods under distress, his remedy for recovery of the rent is suspended (*Edwards* v. *Kelly* (1817), 6 M. & S. 204, *per* BAILEY and HOLROYD, JJ., at p. 209; *Lehain* v. *Philpott* (1875), L. R. 10 Exch. 242, 246, 247). The statute does, however, comprise a case where the promise is to pay rent in arrear, and also to become due, in consideration of the distress being abandoned, and in such circumstances the entire promise is, unless in writing, incapable of being enforced by action (*Thomas* v. *Williams* (1830), 10 B. & C. 664; and see *Lexington* (*Lord*) v. *Clarke* (1690), 2 Vent. 223).

(*r*) This would apply whenever the guarantee is accessory to a contract void and incapable of his ratification by reason of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62). See *Harris* v. *Huntback* (1757), 1 Burr. 373; *Duncomb* v. *Tickridge* (1648), Aleyn, 94. As to indemnities by infants, see *Steeden* v. *Walden*, [1910] 2 Ch. 393; and, generally, title INFANTS AND CHILDREN.

(*s*) *Maggs* v. *Ames* (1828), 4 Bing. 470, where a guarantee for a married woman was assumed to be within s. 4 of the Statute of Frauds (29 Car. 2, c. 3), though no actual decision was given on the point; and see *Leaf* v. *Tuton* (1842), 10 M. & W. 393. Such a promise should certainly be treated as being within the statute, whenever a married woman is personally liable, whether under the Married Women's Property Acts, 1870—1908, or otherwise (see *Re Allen*, [1894] 2 Q. B. 924; *Re Turnbull*, *Turnbull* v. *Nicholas*, [1900] 1 Ch. 180).

(*t*) Even where a married woman is not herself personally liable, but only her

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890. Original, as distinguished from collateral, conditional, or accessory, promises are outside the statute (*u*), because they bind the promisor to do something independently of, and without regard to, another's liability (*a*).

Original promises outside the statute.

separate estate, she is, nevertheless, a person against whom an action can be brought, and judgment recovered (for form of judgment see *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A.). Therefore, a guarantee for her, if made to the person to whom she is, or is to become, liable is certainly made to the creditor in this sense at least, that it is made to a person capable of enforcing his claim against her by action, which is one necessary condition to bring any case within s. 4 of the Statute of Frauds (29 Car. 2, c. 3) (see pp. 461 *et seq.*, *post;* and see *Re Hoyle, Hoyle* v. *Hoyle,* [1893] 1 Ch. 84, C. A., *per* BOWEN, L.J., at p. 99). On the other hand it might be urged that, where she is not personally liable, the statute cannot apply, because in such case the separate estate is the real principal debtor, and not the married woman, reasoning by analogy to the judgment in *Williams* v. *Leaper* (1766), 2 Wils. 308, which decides that where goods under distress replace the real debtor a promise to pay rent in arrear is outside the statute; see p. 459, *ante.*

(*u*) Thus, if two come to a shop, and one buys, and the other to gain him credit promises the seller that, if the buyer does not pay him, the promisor will do so, this is a collateral undertaking, and not actionable without writing; but on the other hand, if the buyer's friend says to the seller, "Let him have the goods, and I will see you paid," this is an original undertaking for the promisor himself and outside the statute (*Birkmyr* v. *Darnell* (1704), 1 Salk. 27; 1 Smith, L.C., 11th ed., p. 299). Other examples of original promises are:—A promise to pay another's debt out of a fund or proceeds of sale of goods belonging to the latter (*Parkins* v. *Moravia* (1824), 1 C. & P. 376; *Stephens* v. *Pell* (1834), 2 Cr. & M. 710; *Edwards* v. *Kelly* (1817), 6 M. & S. 204; and see *Bampton* v. *Paulin* (1827), 4 Bing. 264; *Masters* v. *Marriot* (1693), 3 Lev. 363), or out of the debtor's own money, when it has been received by the promisor (*Andrews* v. *Smith* (1835), 2 Cr. M. & R. 627; *Dixon* v. *Hatfield* (1825), 2 Bing. 439); a promise to pay such debt should the promisor have money in his hands due to the debtor, on a proper assignment and a proper discharge from the latter (*Sweeting* v. *Asplin* (1840), 7 M. & W. 165, *per* PARKE, B., at p. 171); a promise that if the promisee will accept certain bills for a firm the promisor will take care that they shall be met at maturity, and will provide the promisee with funds for the purpose (*Guild & Co.* v. *Conrad,* [1894] 2 Q. B. 884, C. A., where the promisor's son was a partner in the firm whose bills the promisee was asked to accept); a promise to pay, in certain events, a sum of money to another if the latter will procure a loan for the promisor, and guarantee the lender the repayment thereof (*Re Bolton* (1892), 8 T. L. R. 668); a promise to a sheriff's officer, about to take goods in execution on a *fi. fa.*, to pay the amount of the judgment debt if he will restore the goods (*Love's Case* (1706), 1 Salk. 28; and see *Reader* v. *Kingham* (1862), 13 C. B. (N. S.) 344; *Bayne* v. *Hare* (1859), 1 L. T. 40); a promise that another person shall not leave the kingdom without paying his debt (*Elkins* v. *Heart* (1731), Fitz-G. 202); or a promise to procure the signature of another to a guarantee (*Bushell* v. *Beavan* (1834), 1 Bing. (N. C.) 103). But a promise to pay another's debt out of money due to the promisor himself when received by the latter (*Morley* v. *Boothby* (1825), 3 Bing. 107), or a promise to give a guarantee (*Mallet* v. *Bateman* (1865), L. R. 1 C. P. 163, Ex. Ch.), or a promise to give bills for a debt due to a company (*Harburg India Rubber Comb Co.* v. *Martin,* [1902] 1 K. B. 778, C. A.), is collateral and accessory, and within the statute.

(*a*) *Gordon* v. *Martin* (1731), Fitz-G. 302, *per* LEE, J., at p. 303; *Watkins* v. *Perkins* (1697), 1 Ld. Raym. 224; *Jarmain* v. *Algar* (1826), 2 C. & P. 249; *Barrell* v. *Trussell* (1811), 4 Taunt. 117; *Read* v. *Nash* (1751), 1 Wils. 305; *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Pearce* v. *Blagrave* (1855), 3 C. L. R. 338. In *Tomlinson* v. *Gill* (1756), Amb. 330, Lord HARDWICKE, L.C., distinguishes between a promise to pay the original debt on the footing of the original contract, and where the promise is founded on a new consideration. This distinction no longer prevails. Moreover, whether the statute applies or not depends not on the consideration for the promise, but on other matters; see p. 456, *ante.*

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Though all guarantees partake of the nature of indemnities (*b*) an indemnity is really a contract in the nature of an original obligation (*c*), and, therefore, outside the statute (*d*).

To the class of indemnities outside the statute belong promises to indemnify a third person against the cost of litigation undertaken at the promisor's request (*e*). However, a promise by the indorser of an unpaid note to indemnify the holder if he will proceed to enforce payment against the other parties to the note is within the statute, and must be in writing (*f*).

Promises to be jointly liable with another are outside the statute (*g*). In such cases there is really no principal debtor, but there are only joint debtors, equally liable (*h*).

Promise must be made to the creditor.

891. The statute (*i*) does not apply to any promise to be answerable for another, unless such promise is made to the creditor, that is to say, to the person to whom another is already,

(*b*) *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 784; and see *Sampson* v. *Burton* (1820), 4 Moore (C. P.), 515.

(*c*) *Ibid.*; and see *Guild & Co.* v. *Conrad*, [1894] 2 Q. B. 884, C. A., *per* DAVEY, L.J., at p. 896; *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178, C. A.; *Re Bolton* (1892), 8 T. L. R. 668.

(*d*) Examples of indemnities outside the statute are:—An undertaking by an underwriter at Lloyd's for the solvency of a surety for the maker of a promissory note (*Seaton* v. *Burnand, Burnand* v. *Seaton*, [1900] A. C. 135); a promise that if another will, at the promisor's request, put his name to a bill of exchange, the promisor will see him harmless (*Batson* v. *King* (1859), 4 H. & N. 739, *per* POLLOCK, C.B., at p. 740); a promise to indemnify another from the consequences of entering into a surety bond (*Thomas* v. *Cook* (1828), 8 B. & C. 728); or to hold a co-surety indemnified from all loss arising from the suretyship (*Rae* v. *Rae* (1857), 6 I. Ch. R. 490); or a promise made to a funeral undertaker that if he will give up certain documents deposited with him by the administratrix of a deceased person, the promisor will be answerable for the cost of the deceased's funeral (*Walker* v. *Taylor* (1834), 6 C. & P. 752). Neither did the statute apply to a promise, now illegal, whether given by the prisoner or by a stranger (*Consolidated Exploration and Finance Co.* v. *Musgrave*, [1900] 1 Ch. 37; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A.; *Jones* v. *Orchard* (1855), 16 C. B. 614; and see *R.* v. *Porter*, [1910] 1 K. B. 369, C. C. A.), to indemnify another against all costs, damages, and expenses, in respect of his entering into a recognisance of bail in a criminal case (*Cripps* v. *Hartnoll* (1863), 4 B. & S. 414; *contra, Green* v. *Cresswell* (1839), 10 Ad. & El. 453, which apparently is now overruled (see *Wildes* v. *Dudlow* (1874), L. R. 19 Eq. 198; *Batson* v. *King, supra; Reader* v. *Kingham* (1862), 13 C. B. (N. S.) 344)); and see p. 446, *ante*.

(*e*) *Howes* v. *Martin* (1794), 1 Esp. 162; *Adams* v. *Dansey* (1830), 6 Bing. 506; but see *Winckworth* v. *Mills* (1796), 2 Esp. 484. See also pp. 444 *et seq.*, *ante*.

(*f*) *Winckworth* v. *Mills, supra*.

(*g*) *Scholes* v. *Hampson and Merriot* (1806), Fell, Law of Mercantile Guarantees, 2nd ed., pp. 27, 28, where CHAMBRE, J., held that an agreement, whereby, in consideration of the supply by A. to B. of such cotton as he might want, C. consented to credit being given by A. to B. and C. jointly, the invoices to be made out in their joint names, is not within the statute. See also *Bain* v. *Cooper* (1841), 1 Dowl. (N. S.) 11, *per* PARKE, B., at p. 14.

(*h*) See *Batson* v. *King, supra; Waugh* v. *Carver* (1793), 2 Hy. Bl. 235. A person who was originally a surety, may subsequently become jointly liable with the principal debtor (*Buck* v. *Hurst and Bailey* (1866), L. R. 1 C. P. 297; and see p. 443, *ante*).

(*i*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

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or is thereafter to become, liable, and who can enforce such liability by action (*k*).

The statute does not, therefore, apply to a promise made to the principal debtor himself (*l*), by one co-debtor to another (*m*), nor to a promise made to a stranger to a contract for its performance by a third person (*n*), nor to a person becoming bail for another's appearance to a criminal charge (*o*), nor, it seems, to a promise to a firm, of which the promisor is himself a member, to be answerable for another to such firm (*p*).

Liability must result from surety's promise only.

892. The statute (*q*) does not apply to any case, unless there is an absence of all liability on the part of the promisor (the surety), or of his property, except such as arises from his own express promise (*r*).

Where, therefore, the person making the promise has personally, or through an agent, an interest in the property liberated by the surety's promise, the statute does not apply (*s*). Such interest must, however, be a legal interest in the freeing of the property in question, and not merely such an interest as a person may have as a shareholder, or otherwise, in freeing the goods of his company from execution (*t*). The true test whether the Statute of Frauds applies is to see whether the person who makes the promise is, but for the liability that attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it, independently of the promise (*a*).

(*k*) Ever since the case of *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438, the rule of law has been as stated in the text; and see *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 784.

(*l*) *Eastwood* v. *Kenyon*, *supra*; and see *Wildes* v. *Dudlow* (1874), L. R. 19 Eq. 198; *Castling* v. *Aubert* (1802), 2 East, 325; *Gregory* v. *Williams* (1817), 3 Mer. 582.

(*m*) *Thomas* v. *Cook* (1828), 8 B. & C. 728; and see *Rae* v. *Rae* (1857), 6 I. Ch. R. 490.

(*n*) *Hargreaves* v. *Parsons* (1844), 13 M. & W. 561, 570. So, a promise to a county court bailiff for payment of a judgment debt due to another (the judgment creditor) is outside the statute (*Reader* v. *Kingham* (1862), 13 C. B. (N. S.) 344; *Love's Case* (1706), 1 Salk. 28), because the bailiff, being a stranger to the judgment obtained, is not "the creditor."

(*o*) *Cripps* v. *Hartnoll* (1863), 4 B. & S. 414. There is no debt or duty, in such a case, due to the party bailing another from the latter (*ibid.*, *per* WILLIAMS, J., at p. 420).

(*p*) *Re Hoyle*, *Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, 99, C. A.; and see *Ellis* v. *Kerr*, [1910] 1 Ch. 529.

(*q*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*r*) See the statement of the law on this subject in notes to *Forth* v. *Stanton* (1669), 1 Wms. Saund., 6th ed., p. 211, which was adopted as correct by COCKBURN, C.J., in *Fitzgerald* v. *Dressler* (1859), 7 C. B. (N. S.) 374.

(*s*) *Walker* v. *Taylor* (1834), 6 C. & P. 752; *Castling* v. *Aubert*, *supra*; *Fitzgerald* v. *Dressler*, *supra*.

(*t*) *Harburg India Rubber Comb Co.* v. *Martin*, *supra*.

(*a*) *Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285, C. A., *per* LOPES, L.J., at p. 290; *Orrell* v. *Coppock* (1856), 2 Jur. (N. S.) 1244, *per* KINDERSLEY, V.-C., at p. 270. The following cases which, for various reasons, were held to be outside the statute are also, it is submitted, examples of the principle of law stated in the text, though not invariably so treated, namely:—*Walker* v. *Taylor* (1834), 6 C. & P. 752, where the promise to be answerable for another's debt was made in consideration of the promisee abandoning his lien on certain beer licences, in which

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Main object must be payment of a third party's debt or liability.

Del credere contracts outside s. 4.

893. The main or immediate object of the agreement between the parties must, to bring a case within the statute (*b*), be to secure the payment of a debt, or the fulfilment of a duty by a third party (*c*).

Where the payment of a debt or the fulfilment of a duty by another is a mere indirect incident (*d*), or ulterior consequence (*e*), of the terms in which the contract is framed, the transaction is outside the statute. Hence, the promise of a *del credere* agent, who, for a higher commission, guarantees the solvency of those to whom he sells his principal's goods, need not be in writing (*f*). Such contract is not really one of guarantee, but one settling the terms on which an agent shall be employed (*g*), its main object being, not to obtain a guarantee in respect of a third party's debt or liability, but to secure the exercise of greater care by the agent in selling only to solvent purchasers (*h*).

the promisor had a direct interest; *Houlditch* v. *Milne* (1800), 3 Esp. 86, where the promisor himself was already liable for repairs to a third person's carriage, independently of his express promise to be answerable for the same, and in consideration of which the promisee abandoned his lien on the carriage; *Williams* v. *Leaper* (1766), 2 Wils. 308, where the promisor's position was in the nature of that of a bailiff for the landlord, the promisor holding a bill of sale over the goods liable to distress, which were surrendered to the promisor on his undertaking to pay the rent in arrear; *Howes* v. *Martin* (1794), 1 Esp. 162, where the promisor (though not a party thereto) was interested in the action defended at his request on his undertaking to pay the costs incurred by the defendant; *Masters* v. *Marriot* (1693), 3 Lev. 363, where the promise to be answerable for payment of money by the promisor's own agent was treated as being merely expressive of an already existing liability on the part of the promisor himself; *Thomas* v. *Cook* (1828), 8 B. & C. 728, where the promise to be answerable was made by one who was already liable as co-surety with the promisee; *Ardern* v. *Rowney* (1805), 5 Esp. 254, where the promisor merely agreed to be answerable for a definite sum due from another, to the extent only of the promisor's actual indebtedness to such other person; *Hodgson* v. *Anderson* (1825), 5 Dow. & Ry. (K. B.) 735, where the promisors verbally agreed to apply moneys, for which they were already accountable to their principal, in discharge of the latter's liability to his own creditor, to whom the promise was made; and *Stephens* v. *Squire* (1696), 5 Mod. Rep. 205, where the promise was made by one of several defendants to pay a certain sum and costs if the action were abandoned against all the defendants.

(*b*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*c*) *Macrory* v. *Scott* (1850), 5 Exch. 907, 914. Thus, the statute does not apply to an agreement whereby property already pledged for one debt is pledged for another, and where, though the ultimate object thereof is the payment of a third party's debt, its immediate object is only to appropriate a fund in a particular way (*ibid.*). Nor does it apply to a contract whereby it is agreed that if the promisee will surrender his lien on certain policies of insurance in respect of acceptances he has given for a third party, the promisor will take the policies with incumbrances, and provide for the acceptances at maturity (*Castling* v. *Aubert* (1802), 2 East, 325).

(*d*) *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 786.

(*e*) *Sutton & Co.* v. *Grey* (1893), 69 L. T. 354, *per* BOWEN, L.J., at p. 355; affirmed, [1894] 1 Q. B. 285, C. A.

(*f*) *Couturier* v. *Hastie* (1856), 5 H. L. Cas. 673; *Wickham* v. *Wickham* (1855), 2 K. & J. 478; *Wolff* v. *Koppel* (1846), 5 Hill, New York Reports, 458; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126, *per* BLACKBURN, J., at pp. 132, 133. An agreement in the nature of a *del credere* agreement may even be inferred from evidence of the course of conduct between the parties (*Shaw* v. *Woodcock* (1827), 7 B. & C. 73).

(*g*) *Sutton & Co.* v. *Grey*, *supra*, *per* BOWEN, L.J., at p. 355; affirmed, [1894] 1 Q. B. 285, C. A.

(*h*) *Ibid.*; and see *Couturier* v. *Hastie*, *supra*; *Wickham* v. *Wickham*, *supra*;

SECT. 2. **Guarantees within the Statutory Provisions.**

Provided that the payment of a debt of a third party be the main object of a contract, the statute applies, whatever the motive may be for entering into it (*i*).

Contracts relating to sale.

894. Whenever the transaction between the promisor and the creditor, to whom the promise is made, amounts to a sale or surrender by the latter, to or for the benefit of the former, of a security for the debt of another or of the debt itself, the statute (*k*) does not apply.

When statute does not apply.

Hence, the statute is inapplicable where the subject-matter of a contract is the purchase of property, or its relief from incumbrances or other liability, even though, as an incident to such contract, the debt of another to a third party should be paid (*l*).

SECT. 3.—*Written Evidence required.*

When the memorandum must come into existence.

895. The written memorandum required (*m*) need not be contemporaneous with the actual contract entered into, as the contract exists independently of such memorandum (*n*), which, indeed, at the time it is made, must, to be effectual, be a memorandum

Wolff v. *Koppel* (1846), 5 Hill, New York Reports, 458; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126, *per* BLACKBURN, J., at pp. 132, 133. Though the decisions as to contracts with *del credere* agents have gone to an extreme limit in distinguishing promises which are, from those which are not, within the Statute of Frauds (*Sutton & Co.* v. *Grey* (1893), 69 L. T. 354, *per* BOWEN, L.J.; affirmed, [1894] 1 Q. B. 285, C. A.; *Wickham* v. *Wickham* (1885), 2 K. & J. 478), the principle thereof was applied to a contract providing that the defendant should introduce clients to a firm of stockbrokers and share with the latter the profit and loss on any business done in consequence of such introduction, and which was held to be outside the statute (*Sutton & Co.* v. *Grey*, *supra*).

(*i*) *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A.

(*k*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*l*) *Harburg India Rubber Comb Co.* v. *Martin*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 786. Thus, the statute does not apply to a promise to pay to creditors a composition on their debts, in consideration of such debts being assigned to the promisor (*Anstey* v. *Marden* (1804), 1 Bos. & P. (N. R.) 124); nor to a promise to a sheriff's officer to pay a judgment debt, due from another, in consideration of the goods taken in execution being restored (*Love's Case* (1706), 1 Salk. 28); nor to a promise to the holder of a bill of sale, who has become absolute owner, by virtue thereof, of the goods of his debtor, to pay the latter's debt, in consideration of the power of sale not being exercised (*Barrell* v. *Trussell* (1811), 4 Taunt. 117); nor to a promise to pay another's debt, in consideration of the promisee giving up property to the promisor (*Houlditch* v. *Milne* (1800), 3 Esp. 86; *Fitzgerald* v. *Dressler* (1859), 7 C. B. (N. S.) 374; *Thomas* v. *Cook* (1828), 8 B. & C. 728: *Harburg India Rubber Comb Co.* v. *Martin*, *supra*, *per* COZENS-HARDY, L.J., at p. 792), or securities (*Castling* v. *Aubert* (1802), 2 East, 325, and see *Meredith* v. *Short* (1702), 1 Salk. 25) subject to a lien; nor where a distress is abandoned, in consideration of a promise to pay rent in arrear (*Williams* v. *Leaper* (1766), 2 Wils. 308; *Edwards* v. *Kelly* (1817), 6 M. & S. 204; *Bampton* v. *Paulin* (1827), 4 Bing. 264), the goods being delivered to the promisor (*ibid.*); but, it seems, not otherwise (see *Clancy* v. *Piggott* (1835), 4 Nev. & M. (K. B.) 496); and see note (*q*), p. 459, and note (*u*), p. 460, *ante*.

(*m*) For detailed information as to the kind of memorandum that will satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 4, see title CONTRACT, Vol. IX., pp. 367 *et seq.*

(*n*) See *Longfellow* v. *Williams* (1804), Peake, Add. Cas. 225; *Stewart* v. *Eddowes*, *Hudson* v. *Stewart* (1874), L. R. 9 C. P. 311; *Warner* v. *Willington* (1856), 3 Drew. 523.

of a complete contract (*o*). However, the existence of such a memorandum, before action is brought, is essential (*p*). This is somewhat anomalous, since the statute affects only the mode of proof (*q*), but the rule is founded on the wording of the section (*r*).

Only one memorandum required.

896. The statute (*s*) need only once be satisfied by a memorandum in writing (*t*), and, where the original written evidence of a guarantee is lost, parol evidence of its having existed is admissible (*u*).

Form of the memorandum.

897. No special form of words is required to be used in framing a guarantee (*a*), and the word "guarantee" need not be employed (*b*). Any writing embodying the terms of agreement between the parties, and signed by the party to be charged, is sufficient, and the idea of agreement need not be present to the mind of the person signing (*c*).

Liability arising on bill or note.

Where the liability of a surety arises on a bill or note no other written evidence is required, if the obligation arising on the face

(*o*) *Munday* v. *Asprey* (1880), 13 Ch. D. 855; and see *Warner* v. *Willington* (1856), 3 Drew. 523; *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434, C. A.

(*p*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357, C. A.; *Sievewright* v. *Archibald* (1851), 17 Q. B. 103, 107; *Middleton* v. *Brewer* (1790), Peake, 20 [15]; *Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, C. A., *per* LINDLEY, L.J., at p. 97.

(*q*) *Re Hoyle, Hoyle* v. *Hoyle*, *supra*, *per* LINDLEY, L.J., at p. 97.

(*r*) *Ibid.*

(*s*) Statute of Frauds (29 Car. 2, c. 3), s. 4. As to this enactment, see pp. 454 *et seq.*, *ante*.

(*t*) Before the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), which requires acknowledgments to be in writing, a verbal promise was sufficient to revive a liability on a written guarantee which was barred by the Statute of Limitations (*Gibbons* v. *M'Casland* (1818), 1 B. & Ald. 690).

(*u*) *Barrass* v. *Reed* (1898), *Times*, 28th March; *Crays Gas Co.* v. *Bromley Gas Consumers' Co.* (1901), *Times*, 23rd March, C. A.

(*a*) *Welford* v. *Beazely* (1747), 3 Atk. 503.

(*b*) *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 792; *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 188; in *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A., however, the fact that the parties had described their contract as a "policy of insurance" was treated by the court as affording some indication of an intention not to enter into a guarantee. A document, though called a guarantee, may really be in the nature of a policy of insurance against the happening of certain events (*Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138, *per* WARRINGTON, J., at p. 147). See further, as to evidence of intention, pp. 539, 572, *post*.

(*c*) *Re Hoyle, Hoyle* v. *Hoyle*, *supra*, *per* LINDLEY, L.J., at p. 98; and see *Ridgway* v. *Wharton* (1857), 6 H. L. Cas. 238; *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1; *Welford* v. *Beazely*, *supra*; *Jones* v. *Williams* (1841), 7 M. & W. 493. Thus, an affidavit, made with quite a different object, is a sufficient note or memorandum to satisfy the statute (*Barkworth* v. *Young* (1856), 4 Drew. 1); or letters written to third parties (*Moore* v. *Hart* (1683), 1 Vern. 110, 201; *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1); or a letter repudiating liability (*Bailey* v. *Sweeting* (1861), 9 C. B. (N. S.) 843; *Wilkinson* v. *Evans* (1866), L. R. 1 C. P. 407; *Buxton* v. *Rust* (1872), L. R. 7 Exch. 1; affirmed (1872), L. R. 7 Exch. 279; and see *Warner* v. *Willington*, *supra*, at p. 531); or the recital by a surety in his will of his indebtedness under a verbal guarantee (*Re Hoyle, Hoyle* v. *Hoyle*, *supra*); or a rough draft comprising all the material terms of the contract entered into, even though a more formal document was intended (*Gray* v. *Smith* (1889), 43 Ch. D. 208, C. A.). But a memorandum written by the creditor's clerk, in the presence of the intending surety, stating that the latter had called to say that he would be responsible for goods delivered to the principal debtor by the creditor, is not a sufficient memorandum (*Dixon* v.

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of such bill or note is the precise obligation the surety has agreed to undertake (*d*), though, where this is not the case, parol evidence will not be admitted to establish the existence of a special contract of suretyship different from what the law merchant infers from the surety's mere signature of a bill or note (*e*). However, a joint and several promissory note which contains, in addition to the common clause as to payment of instalments, a proviso stipulating that no time given to, nor security taken from, nor composition or arrangement entered into with, either party thereto, shall prejudice the rights of the holder to proceed against any other party, is a valid promissory note (*f*). On the other hand, a cheque drawn by a firm on a banking company, and indorsed to the banking company by a surety with words indicating that he knows the firm to be a genuine one, is not sufficient evidence of a promise of guarantee (*g*), though a letter returning bills of exchange, that were sent to the writer of the letter to indorse, which he refuses to do, at the same time adding that should the bills not be honoured when due the writer will see them paid, satisfies the statute (*h*).

How the guarantee must be written.

The memorandum need not be written on one piece of paper, nor be a complete document, signed by the party at one and the same time, but may consist of several different papers, which need not all be written on the same day (*i*), though they must be so connected that they can be read together, so as to form one memorandum of the contract between the parties (*k*).

Broomfield (1814), 2 Chit. 205; and see *Jones* v. *Beach* (1852), 2 De G. M. & G. 886; *Allaway* v. *Duncan* (1867), 16 L. T. 264).

(*d*) *Holmes* (*J. W.*) *& Co.* v. *Amaza Durkee* (1883), Cab. & El. 23, 27; *Wilkinson* v. *Unwin* (1881), 7 Q. B. D. 636, C. A. The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), provides that a bill of exchange or a promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company, if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority (*ibid.*, s. 77).

(*e*) See *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754, 784, 786; *Holmes* (*J. W.*) *& Co* v. *Amaza Durkee, supra; Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C.; *Jenkins & Sons* v. *Coomber*, [1898] 2 Q. B. 168, approved in *Glenie* v. *Smith*, [1908] 1 K. B. 263, C. A.; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, C. A. A promise, to pay on demand bills, upon their reaching maturity, given, not upon the face of the bills themselves, but by a collateral writing, is binding to all intents and purposes on the giver of it (*Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L. 348).

(*f*) *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531, C. A., approving *Yates* v. *Evans* (1892), 61 L. J. (Q. B.) 446, and overruling *Kirkwood* v. *Smith*, [1896] 1 Q. B. 582. In certain circumstances, a surety may be precluded from setting up as a defence to the bills of exchange under which his liability arises that they were not complete and regular on the face of them when he indorsed them (*Glenie* v. *Smith, supra*).

(*g*) *Ulster Banking Co.* v. *Mahaffy* (1881), 15 I. L. T. 94; and see *Parsons* v. *Barclay & Co.* (1910), 26 T. L. R. 628, C. A.

(*h*) *Morris* v. *Stacey* (1816), Holt (N. P.), 153.

(*i*) *Sheers* v. *Thimbleby & Son* (1897), 76 L. T. 709, C. A., *per* LOPES, L.J., at p. 711, and *per* CHITTY, L.J., at p. 712.

(*k*) *Oliver* v. *Hunting* (1890), 44 Ch. D. 205, 207; *Macrory* v. *Scott* (1850), 5 Exch. 907; *Sheers* v. *Thimbleby & Son, supra; Coe* v. *Duffield* (1822), 7

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Parol evidence, while not admissible to connect papers which, on the face of them, have no reference to, nor connection with, each other (*l*), is available to identify any document referred to in another (*m*), and to explain the circumstances in which a document was written (*n*).

The indorsement by a surety of his undertaking to be answerable made on the agreement between the principal debtor and the creditor, and referring thereto, suffices (*o*).

Form of guarantee by a company.

898. A guarantee by and on behalf of a limited company (*p*) can, equally with any other contract required by law to be in writing signed by the party to be charged therewith or by some other person thereunto lawfully authorised, be made or varied on behalf of the company by writing, signed by any person acting under its authority (*q*), and will then be effectual in law and bind the company and its successors and all other parties thereto, their heirs, executors, or administrators, as the case may be (*r*).

The names of the contracting parties must appear.

899. In order to satisfy the Statute of Frauds (*s*) the names of all the contracting parties must appear in writing (*t*) as contracting parties, and not merely as descriptive of the subject-matter of the contract (*a*). The memorandum need not, however, be addressed to the other contracting party (*b*), nor apparently to anybody, in which latter case the guarantee will enure for the benefit of those to whom or for whose use it was delivered (*c*).

Moore (C. P.), 252; *Brettel* v. *Williams* (1849), 4 Exch. 623; and see, generally, title CONTRACT, Vol. VII., pp. 367 *et seq.*

(*l*) *Stead* v. *Liddard* (1823), 8 Moore (C. P.), 2; *Macrory* v. *Scott* (1850), 5 Exch. 907; *Coe* v. *Duffield*, (1882), 7 Moore (C. P.), 252.

(*m*) *Macrory* v. *Scott*, *supra*; *Oliver* v. *Hunting* (1890), 44 Ch. D. 205, *per* KEKEWICH, J., at pp. 208, 209.

(*n*) *Oliver* v. *Hunting*, *supra*; *Plant* v. *Bourne*, [1897] 2 Ch. 281, C. A.; see title EVIDENCE, Vol. XIII., p. 426.

(*o*) *Stead* v. *Liddard*, *supra*; *Bluck* v. *Gompertz* (1852), 7 Exch. 862.

(*p*) For detailed information as to contracts by public companies, see title COMPANIES, Vol. V., pp. 297 *et seq.* As to a representation by a company, see p. 457, *ante*.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 76 (1) (ii.). The guarantee may be discharged in the same manner (*ibid.*) In the case of a guarantee by deed by a company it may be made, varied, or discharged under its common seal (*ibid.*).

(*r*) *Ibid.*, s. 76 (2).

(*s*) 29 Car. 2, c. 3, s. 4.

(*t*) *Williams* v. *Lake* (1859), 2 E. & E. 349; *Sheers* v. *Thimbleby & Son* (1897), 76 L. T. 709, 711, C. A.; where agents are acting for principals, if the names of the agents appear that suffices, even if the agency is not disclosed (*Filly* v. *Hounsell*, [1896] 2 Ch. 737).

(*a*) *Vandenbergh* v. *Spooner* (1866), L. R. 1 Exch. 316; *Newell* v. *Radford* (1867), L. R. 3 C. P. 52.

(*b*) *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1; where a guarantee was addressed by the defendant to the attorney for the plaintiff, it was held that the plaintiff was entitled to the benefit of it (*Bateman* v. *Phillips* (1812), 15 East, 272; and see *Longfellow* v. *Williams* (1804), Peake, Add. Cas. 225).

(*c*) *Walton* v. *Dodson* (1827), 3 C. & P. 162; but see *Williams* v. *Lake*, *supra*; *Liverpool Borough Bank* v. *Eccles* (1859), 4 H. & N. 139, with which it is difficult to reconcile the first-named case. As to guarantees given to a firm, see title PARTNERSHIP.

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Written evidence of consideration for guarantee unnecessary.

900. Provided that the promise of the surety duly appear in writing (*d*), as required by statute (*e*), that suffices, for, by the Mercantile Law Amendment Act, 1856 (*f*), no such promise being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, is deemed invalid to support an action merely because the consideration for the same does not appear in writing or by necessary inference from a written document. This statute does not make a promise good which was not so before (*g*), but merely dispenses with any written statement of the consideration, though not with the necessity for a consideration (*h*). If the written memorandum state a bad consideration, it will not be helped by the statute (*i*), and it

(*d*) Formerly, owing to the Statute of Frauds (29 Car. 2, c. 3), s. 4, requiring "the agreement" to be in writing, it was held that, to satisfy the enactment, there must be written evidence, not only of the promise, but also of the consideration (see *Wain* v. *Warlters* (1804), 5 East, 10; 1 Smith, L. C., 11th ed., p. 323; *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595; *Egerton* v. *Mathews* (1805), 6 East, 307), as the two together constitute the agreement, in the case of every contract not under seal (*Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A., *per* BRETT, M.R., at p. 563). The cases as to whether the consideration for the promise of guarantee duly appeared in writing, or by necessary inference from a written document, so as to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 4, are very numerous. Being now obsolete, owing to the provisions of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3 (as to which see *infra*), it is unnecessary to refer to them in detail in the present title. As, however, the principles established by these cases are still sometimes invoked when it has to be determined whether the surety's promise is sufficiently stated in writing, a brief reference thereto may advantageously be made. From the cases in question, it appears that it was not necessary that the consideration should be stated in express terms, it being sufficient if the written memorandum were so framed that a person of ordinary capacity must infer therefrom what the consideration really was (see *Hawes* v. *Armstrong* (1835), 1 Scott, 661; *Caballero* v. *Slater* (1854), 14 C. B. 300; *Jarvis* v. *Wilkins* (1841), 7 M. & W. 410; *Goldshede* v. *Swan* (1847), 1 Exch. 154), or, if the nature of the consideration could be implied from the written memorandum (see *James* v. *Williams* (1834), 5 B. & Ad. 1109; *Raikes* v. *Todd* (1838), 8 Ad. & El. 846; *Thackwell* v. *Gardiner* (1851), 5 De G. & Sm. 58), with or without the aid of parol evidence as to extrinsic circumstances, or the meaning of the words used (see *Edwards* v. *Jevons* (1849), 8 C. B. 436; *Goldshede* v. *Swan*, *supra*; *Bainbridge* v. *Wade* (1850), 16 Q. B. 89; *Russell* v. *Moseley* (1822), 3 Brod. & Bing. 211). On the other hand, the written memorandum was held to be insufficient to satisfy the statute, if two distinct considerations could, with equal probability, be inferred therefrom as the inducement for the surety's promise (*Baring* v. *Grieve* (1858), 6 W. R. 466; and see *Bentham* v. *Cooper* (1839), 5 M. & W. 621; *Cole* v. *Dyer* (1831), 1 Cr. & J. 461). When a defendant to an action on a guarantee pleaded that there was no memorandum in writing of the consideration, the plaintiff was at liberty to reply that the consideration was in writing without setting out the actual memorandum in his replication (see *Wakeham* v. *Sutton* (1834), 2 Ad. & El. 78). See also de Colyar, Law of Guarantees, 3rd ed., pp. 166 *et seq.*

(*e*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*f*) 19 & 20 Vict. c. 97, s. 3; and see p. 457, *ante*. This enactment, which is not retrospective in its operation, applies to England and Ireland only, and not to Scotland (*ibid.*, s. 17), in which country a consideration is not, and never has been, necessary to the validity of a contract of guarantee, or of any other contract (see Lord Mackenzie's Roman Law, 6th ed., p. 231; Stair's Institutions of the Laws of Scotland, More's ed., i., 10, 7).

(*g*) *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361, *per* BYLES, J., at p. 367.

(*h*) *Glover* v. *Halkett* (1857), 2 H. & N. 487, 489; and see *Baring* v. *Grieve*, *supra*.

(*i*) *Wood* v. *Priestner* (1866), L. R. 2 Exch. 66, *per* BRAMWELL, B., at p. 70.

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seems the parties are bound by any written statement of the consideration which they choose to make (*k*), though, in cases of ambiguity, parol evidence is admissible to show that the consideration alleged is sufficient in law (*l*). Where the whole promise cannot be collected from the written memorandum of the contract, the statute is not satisfied, and parol evidence of the consideration cannot be given in order to explain the promise (*m*). It is not, however, necessary for a written memorandum of guarantee, though it unnecessarily embody the consideration, to state by whom the latter is payable, if this can be inferred, and the intendment then is that it was paid by the party to whom the memorandum was given (*n*). A memorandum which would formerly have satisfied s. 17 of the Statute of Frauds (*o*) will, it seems, also satisfy s. 4 thereof now that written proof of the consideration is no longer necessary in cases under either section (*p*).

By whom the memorandum must be signed.

901. The memorandum need only be signed by the party to be charged (*q*). It does not matter with what intention such signature is affixed (*r*), and the signature of a contracting party, as a witness, is sufficient (*s*). A guarantee drawn up in the plural number, and concluding "as witness our hands," but signed by one surety only, is binding on the surety who signed it (*t*), and a guarantee beginning "we hereby guarantee," signed with the name of a firm, and also by each of the partners of such firm, operates as a separate guarantee by each partner, as well as a joint guarantee by the firm (*u*).

(*k*) *Oldershaw* v. *King* (1857), 2 H. & N. 399, 517, Ex. Ch.

(*l*) *Hoad* v. *Grace* (1861), 7 H. & N. 494.

(*m*) *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361; *Sheers* v. *Thimbleby & Son* (1897), 76 L. T. 709, 711, C. A.; and see *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473.

(*n*) *Dutchman* v. *Tooth* (1839), 5 Bing. (N. C.) 577.

(*o*) 29 Car. 2, c. 3. S. 17 (but not s. 4 (see *Prested Miners Co., Ltd.* v. *Garner, Ltd.*, [1910] 2 K. B. 776, *per* WALTON, J., at p. 780)) has been repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), though re-enacted in slightly varied terms by s. 4 of the latter statute. The reason why a memorandum, which formerly satisfied s. 17 of the Statute of Frauds, will now satisfy s. 4 thereof, is because after the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, the requirements of both sections in regard to the contents of the memorandum were rendered identical, that is to say, in both cases the written memorandum was rendered sufficient if it stated all that had to be done by the party to be charged, whereas formerly such a memorandum would only have satisfied s. 17 (*Sarl* v. *Bourdillon* (1856), 1 C. B. (N. S.) 188; *Kenworthy* v. *Schofield* (1824), 2 B. & C. 945, 947; *Egerton* v. *Mathews* (1805), 6 East, 307).

(*p*) *Holmes* v. *Mitchell*, *supra*, *per* WILLES, J., at p. 367.

(*q*) Statute of Frauds (29 Car. 2, c. 3), s. 4; see pp. 454 *et seq.*, *ante*; and *Laythoarp* v. *Bryant* (1836), 2 Bing. (N. C.) 735, 743; *Smith* v. *Neale* (1857), 2 C. B. (N. S.) 67; *Reuss* v. *Picksley* (1866), L. R. 1 Exch. 342, Ex. Ch.

(*r*) *Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, C. A., *per* BOWEN, L.J., at p. 99.

(*s*) *Wallace* v. *Roe*, [1903] 1 I. R. 32; and see *Welford* v. *Beezely* (1747), 1 Ves. Sen. 6; *contra*, *Gosbell* v. *Archer* (1835), 2 Ad. & El. 500.

(*t*) *Norton* v. *Powell* (1842), 4 Man. & G. 42. Where, however, one surety expressly or impliedly stipulates that the other surety shall also sign, this amounts to a condition precedent which must be fulfilled; see p. 489, *post*.

(*u*) *Re Smith, Fleming & Co., Ex parte Harding* (1879), 12 Ch. D. 557, C. A.; and see *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440.

SECT. 3. Written Evidence required.

Signing by agent.

902. An agent, authorised verbally or in writing, may sign the memorandum (*a*). He need not even be *sui juris* (*b*), nor need he sign as agent (*c*), parol evidence being admissible to show in what capacity he did sign (*d*), so as to render the principal liable but not to discharge him (*e*). Where reliance is placed on the signature of an agent as satisfying the statute (*f*), it must, whether the document signed be a record of the terms or a document referring to and recognising the document actually containing the record of the terms, be shown that the agent signing was an agent "thereunto lawfully authorised" (*g*). A verbal ratification of the agent's signature is sufficient (*h*) where he was not previously "lawfully authorised."

Agents possessing implied power to sign.

Certain agents possess implied authority to sign a guarantee (*i*). Thus, a broker employed to buy or sell goods, it seems, possesses it (*k*), but not a solicitor (*l*), nor a party to be charged (*m*), nor his clerk (*n*), neither of whom can be agent to sign for the other contracting party (*o*).

Directors.

903. In the case of a public company the directors cannot bind the company by a guarantee given by them in the absence of proof of authority to do so (*p*). For this purpose, however, a general

(*a*) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; *Coles* v. *Trecothick* (1804), 9 Ves. 234.

(*b*) *Watkins* v. *Vince* (1818), 2 Stark. 368.

(*c*) *Young* v. *Schuler* (1883), 11 Q. B. D. 651, C. A.

(*d*) *Ibid.*

(*e*) *Higgins* v. *Senior* (1841), 8 M. & W. 834.

(*f*) 29 Car. 2, c. 3, s. 4.

(*g*) *John Griffiths Cycle Corporation, Ltd.* v. *Humber & Co., Ltd.*, [1899] 2 Q. B. 414, C. A.; reversed on another point (1901), 85 L. T. 141, H. L.; and see *Hambro* v. *Burnand*, [1904] 2 K. B. 10, C. A.; *Watkins* v. *Vince*, *supra*; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A.

(*h*) *Maclean* v. *Dunn* (1828), 4 Bing. 722; *Coles* v. *Trecothick*, *supra*. As to what constitutes a binding ratification of an agent's acts, see *Marsh* v. *Joseph*, [1897] 1 Ch. 213, C. A.; *Bartram & Sons* v. *Lloyd* (1904), *Times*, 26th February. A contract entered into by an agent on behalf of an unincorporated company cannot be ratified by the latter after its incorporation; see *Natal Land etc. Co.* v. *Pauline Colliery Syndicate*, [1904] A. C. 120, P. C.

(*i*) See Fell, Law of Mercantile Guarantees, 2nd ed., pp. 89, 94; de Colyar, Law of Guarantees, 3rd ed., pp. 178 *et seq.* No agent, whether authorised to do so or not, can lawfully sign a representation within the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), so as to charge the party making it (see p. 457, *ante*, and cases there cited). As to a partner's power to bind his firm, see title PARTNERSHIP.

(*k*) Fell, Law of Mercantile Guarantees, 2nd ed., pp. 89, 94. For the definition of "broker," see title AGENCY, Vol. I., p. 153.

(*l*) See *Glengal (Earl)* v. *Barnard* (1836), 1 Keen, 769, 787; *Hasleham* v. *Young* (1844), 5 Q. B. 833, 836; and see *Forster* v. *Rowland* (1861), 7 H. & N. 103; *Smith* v. *Webster* (1876), 3 Ch. D. 49, C. A.; *Ridgway* v. *Wharton* (1857), 6 H. L. Cas. 238; *Bowen* v. *D'Orleans (Duc)* (1900), 16 T. L. R. 226, C. A. See title CONTRACT, Vol. VII., p. 379.

(*m*) *Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333; *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch.; see title AGENCY, Vol. I., p. 152.

(*n*) See *Dixon* v. *Broomfield* (1814), 2 Chit. 205; see title AGENCY, Vol. I., p. 170.

(*o*) *Ibid.*; and see *Wright* v. *Dannah* (1809), 2 Camp. 203.

(*p*) *Re Era Life Assurance Society*, [1866] W. N. 309; and see *Colman* v. *Eastern Counties Rail. Co.* (1846), 10 Beav. 1; *Ridley* v. *Plymouth Grinding and Baking Co., Kingsbridge Flour Mill Co.* v. *Same* (1848), 2 Exch. 711; *Re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532.

power of management seems to be a sufficient authority if the giving of the guarantee be fairly within the scope of the company's business (*q*), but not otherwise (*r*).

Extent of liability.

904. When some only of a body of directors have given a guarantee they are primarily liable, unless the other directors adopt it (*s*). A company is certainly not bound by a guarantee given for a fraudulent purpose known to the person to whom the guarantee was given (*t*), while any contract which is *ultra vires*, entered into by directors on behalf of the company, cannot be ratified even by the assent of the whole body of shareholders (*a*). When directors do not intend to bind themselves personally, but are acting solely on behalf of the company, they should be careful to word the contract accordingly (*b*).

What is a sufficient signature.

905. There must be an actual signature, affixed to the memorandum, of the name of the party to be charged, or something intended by him to be an equivalent (*c*), and, though it is permissible for the hand of the person signing to be guided by another (*d*), the mere tracing over a signature with a dry pen is not sufficient (*e*). The mark of a marksman is a good signature (*f*), and no inquiry is allowed in such case as to whether the party making a mark could write (*g*). The signature may be written in pencil (*h*) or printed (*i*), where, at least in the latter case, there is subsequent recognition, or a portion of the instrument is in the handwriting of the party signing (*k*), or indicated by initials, if this is intended to be a signature by the party writing them (*l*).

(*q*) *Re West of England Bank, Ex parte Booker* (1880), 14 Ch. D. 317.

(*r*) *Small* v. *Smith* (1884), 10 App. Cas. 119; and see title COMPANIES, Vol. V., pp. 233, 285, 286. As to the form of guarantee by a company, see p. 467, *ante*.

(*s*) See *Re Dover, Deal and Cinque Ports Rail. Co., Ex parte Londesborough (Lord)* (1853), 1 Eq. Rep. 271; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.; *Yorkshire Railway Wagon Co.* v. *Maclure* (1882), 21 Ch. D. 309, C. A.

(*t*) *British and American Telegraph Co.* v. *Albion Bank* (1872), L. R. 7 Exch. 119; *Grey* v *Lewis* (1869), L. R. 8 Eq. 526.

(*a*) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653; *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, C. A., *per* BRETT, L.J., at p. 71; but see *Phosphate of Lime Co.* v. *Green* (1871), L. R. 7 C. P. 43; *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107.

(*b*) See *Chapman* v. *Smethurst*, [1909] 1 K. B. 927, C. A., distinguishing *Dutton* v. *Marsh* (1871), L. R. 6 Q. B. 361.

(*c*) *Baker* v. *Dening* (1838), 8 Ad. & El. 94. Identification of the party required to sign, without his signature, is not sufficient (*ibid.*). A memorandum written by the plaintiff's clerk in the presence of the defendant and assented to by the latter, but not signed by him, is insufficient (*Dixon* v. *Broomfield* (1814) 2 Chit. 205).

(*d*) *Helshaw* v. *Langley* (1841), 11 L. J. (CH.) 17.

(*e*) See *In the Goods of Maddock* (1874), L. R. 3 P. & D. 169; *In the Goods of Cunningham* (1860), 29 L. J. (P. M. & A.) 71.

(*f*) *Selby* v. *Selby* (1817), 3 Mer. 2; *Baker* v. *Dening, supra*; and see *Dyas* v. *Stafford* (1881), 7 L. R. Ir. 590.

(*g*) *Baker* v. *Dening, supra*.

(*h*) See *Geary* v. *Physic* (1826), 5 B. & C. 234.

(*i*) *Schneider* v. *Norris* (1814), 2 M. & S. 286; *Saunderson* v. *Jackson* (1800), 2 Bos. & P. 238.

(*k*) *Ibid.*

(*l*) *Caton* v. *Caton* (1865), L. R. 2 H. L. 127, *per* Lord WESTBURY, at p. 143;

SECT. 3. **Written Evidence required.**

Position of the signature.

The signature must be so placed as to authenticate every material and operative part of the instrument (*m*). An indorsement made on a signed guarantee by the surety in his own handwriting, and with the creditor's consent, for the purpose of correcting a mistake in the guarantee, is sufficiently authenticated by the surety's signature to the guarantee (*n*).

SECT. 4.—*Stamp Duties.*

On guarantee not under seal.

906. A guarantee not under seal, the matter whereof is of the value of £5 and upwards (*o*), must generally be stamped with a stamp value 6*d.*, imposed on agreements not otherwise specifically charged with duty (*p*). A guarantee for the due performance of a charterparty requires a stamp value 6*d.* only (*q*).

On guarantee under seal.

When the guarantee is under seal a stamp duty of 10*s.* is imposed (*r*), and in certain special cases an *ad valorem* duty is payable (*s*), which apparently never exceeds 10*s.* (*t*).

Separate instruments written on same material.

If more than one instrument be written on the same piece of material, every one of the instruments must be separately and distinctly stamped with the duty with which it is legally chargeable (*u*).

In the Goods of Blewitt (1880), 5 P. D. 116. The christian name may always be denoted by initials, or left out altogether (*Lobb* v. *Stanley* (1844), 5 Q. B. 574, 581, 582).

(*m*) See *Durrell* v. *Evans* (1862), 1 H. & C. 174; *Bluck* v. *Gompertz* (1852), 7 Exch. 862; *Caton* v. *Caton* (1865), L. R. 2 H. L. 127.

(*n*) *Bluck* v. *Gompertz, supra.*

(*o*) If the matter of the agreement be of less value than £5, it is exempt from stamp duty (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Agreement").

(*p*) *Ibid.* A form providing that, in consideration of an advance to persons named, on their joint and several promissory notes, the promisor undertakes to pay a certain sum on demand should the said notes not be met at maturity, is not a promissory note within the meaning of the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 33; and see *Dickinson* v. *Bower* (1898), 14 T. L. R. 146. As to stamp duty generally, see title REVENUE.

(*q*) Under the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 2, now repealed so far as it affects charterparties, such a guarantee was held not to be subject to a 5*s.* stamp duty imposed on an "agreement, letter or other writing for or relating to the freight or conveyance of goods" (see *Rein* v. *Lane* (1867), L. R. 2 Q. B. 144), and it is certainly not liable to such a duty under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 49 (1).

(*r*) *Ibid.*, Sched. I., "Deed."

(*s*) *Ibid.*, Sched. I., "Bond"; and see *National Telephone Co.* v. *Inland Revenue Commissioners*, [1900] A. C. 1; *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners*, [1909] 2 K. B. 604, C. A. The Solicitor-General stated that it is not the practice of the Inland Revenue Commissioners to insist upon *ad valorem* duty in the case of ordinary commercial documents, and that a circular had been sent out to officers of Inland Revenue stating the practice of the Commissioners (see *Times*, 23rd February, 1909).

(*t*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7, which provides that the whole amount of duty payable under or by reference to paragraph (2) of the heading "Mortgage, Bond, Debenture, Covenant, or Warrant of Attorney" in the First Schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39), on any instrument being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance, shall not exceed 10*s.*

(*u*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 3 (2). In a case prior to this enactment it was held that where an unstamped guarantee was indorsed on a paper containing, on the other side thereof, the agreement the performance of which was to be guaranteed, duly stamped, no further stamp was necessary (*Stead* v. *Liddard* (1823), 1 Bing. 196). This decision it is submitted, can no

Moreover, an agreement indorsed on a promissory note given by a surety affecting the use to be made of such note (*a*), or making such note conditional (*b*), must be stamped.

Exemptions.

A guarantee for the payment of goods to be supplied to another is exempt from stamp duty (*c*).

Every writing given in evidence in support of an agreement need not be stamped, but only agreements or memoranda thereof (*d*). Where the consideration for the surety's promise is the giving up of a guarantee, such guarantee, though unstamped, may be produced in evidence (*e*). A consent or licence that time may be given to the principal debtor, expressed upon a promissory note given by a surety, need not be stamped (*f*).

Representations as to character etc. (*g*) within the Statute of Frauds Amendment Act, 1828 (*h*), are expressly exempted from stamp duty (*i*).

Time for stamping.

A guarantee should be stamped before execution, but can be stamped at any time afterwards on certain terms (*k*).

An instrument of guarantee is not, save in criminal proceedings, available for any purpose whatever, and cannot be given in evidence, unless it be properly stamped according to the law in force when it was executed (*l*).

longer be supported. A promissory note beginning "I promise to pay" and signed by the principal debtor, if it be subsequently signed by the surety, needs no further stamp, where it was originally stitpulaed between the payee and the principal debtor that the surety should also sign it (*Clerk* v. *Blackstock* (1816), Holt (N. P.), 474).

(*a*) *Cholmeley* v. *Darley* (1845), 14 M. & W. 344. A document containing (1) a promise to pay money lent, with interest, before a certain day, signed by the borrower, (2) a conditional clause signed by two persons guaranteeing payment by the borrower, and (3) an assignment to the lender by one of the sureties of a policy on the life of the borrower, was held to be rightly stamped with a 6*d.* stamp on the guarantee and a 1*s.* stamp on the equitable assignment of the policy, and not to require, in addition, a promissory note stamp (see *Balck* v. *Pilcher* (1909) 25 T. L. R. 497).

(*b*) *Leeds* v. *Lancashire* (1809), 2 Camp. 205.

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Agreement," which exempts from stamp duty "any agreement, letter or memorandum made for or relating to the sale of goods"; and see *Chatfield* v. *Cox* (1852), 18 Q. B. 321; *Warrington* v. *Furbor* (1807), 8 East, 242; *Curry* v. *Edensor* (1790), 3 Term Rep. 524; *Watkins* v. *Vince* (1818), 2 Stark. 368; *Sadler* v. *Johnson* (1847), 16 M. & W. 775; *Martin* v. *Wright* (1845), 6 Q. B. 917; and title SALE OF GOODS.

(*d*) Since the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which by s. 3 dispenses with written evidence of the consideration (see pp. 457, 468, *ante*), a memorandum in writing of the surety's "promise" must be stamped as an agreement of guarantee (*Whitfield* v. *Moojen* (1858), 1 F. & F. 290; *Glover* v. *Halkett* (1857), 2 H. & N. 487).

(*e*) *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, 323.

(*f*) *Yates* v. *Evans* (1892), 61 L. J. (Q. B.) 446.

(*g*) See p. 457, *ante*.

(*h*) 9 Geo. 4, c. 14.

(*i*) *Ibid.*, s. 8.

(*k*) These terms are mentioned in the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15. So much of this enactment as limits the time within which the Commissioners of Inland Revenue may mitigate or remit any penalty payable on stamping documents after execution has been repealed by the Finance Act, 1895 (58 & 59 Vict. c. 16), s. 15. See, generally, title REVENUE.

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4).

PART IV. Interpretation.

Part IV.—Interpretation.

Rules of construction.

907. The rules of construction governing contracts in general (*m*) apply to the contract of guarantee (*n*): thus the whole of the contract must be considered in order to ascertain its effect and scope (*o*), and the language thereof must be interpreted according to its primary, grammatical, and natural sense (*p*), where such a construction does not lead to absurdity (*q*). Moreover, where a contract has been construed by courts of law in a particular way, and that interpretation comes to be accepted in trade or business, and people afterwards make contracts on that understanding, a court will not depart from that recognised interpretation, for, were it to do so, it would be construing contracts contrary to the meaning of those who made them (*r*). Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to give effect to what may fairly be inferred to have been the real intention and understanding of the parties as expressed by them in writing (*s*), and *ut res magis valeat quam pereat* (*t*).

(*m*) See generally, on this subject, titles CONTRACT, Vol. VII., pp. 509 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.* In other parts of this title, and notably where the liability of the surety is dealt with at pp. 478 *et seq.*, 491 *et seq.*, *post*, the construction of guarantees is incidentally involved and dealt with.

(*n*) *Faber* v. *Lathom* (*Earl*) (1897), 77 L. T. 168, *per* HAWKINS, J., at p. 169, following *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, *per* Lord WENSLEYDALE, at p. 106: "The rule universally adopted in the courts of law is that, in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless it would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further . . . and that the intention of the parties is to be derived from the words used"; and see *Cosford Union* v. *Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd.* (1910), 103 L. T. 463.

(*o*) *Arlington* (*Lord*) v. *Merricke* (1672), 2 Wms. Saund. (1871 ed.) 813; and see *Cosford Union* v. *Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd.*, *supra*.

(*p*) *Allnutt* v. *Ashenden* (1843), 5 Man. & G. 392; *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309. Where the context affords an interpretation different from the ordinary meaning of the words, or their conventional meaning is not the same as their legal sense, the meaning to be attributed to the words of a contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation (*M'Cowan* v. *Baine*, *The "Niobe,"* [1891] A. C. 401, *per* Lord WATSON, at p. 408).

(*q*) *Chalmers* v. *Victors* (1868), 16 W. R. 1046; *Eastern Union Rail. Co.* v. *Cochrane* (1853), 9 Exch. 197, *per* ALDERSON, B., at p. 206.

(*r*) *Re National Coffee Palace Co., Ex parte Panmure* (1883), 24 Ch. D. 367, C. A., *per* BRETT, M.R., at p. 370. As to effect of usage upon contracts generally, see title CUSTOM AND USAGES, Vol. X., pp. 260 *et seq.*

(*s*) *Bank of Montreal* v. *Munster Bank* (1876), 11 I. R. C. L. 47, *per* FITZGERALD, J., at p. 55; see *Dawson* v. *Bank of Whitehaven* (1877), 6 Ch. D. 218, C. A.; *Barber* v. *Mackrell* (1892), 68 L. T. 29, C. A.; *Other* v. *Iveson* (1855), 3 Drew. 177, *per* KINDERSLEY, V.-C., at p. 182; *York City and County Banking Co.* v. *Bainbridge* (1880), 43 L. T. 732.

(*t*) *Stewart and Macdonald* v. *Young* (1894), 38 Sol. Jo. 385, where, however, WILLS, J., said that a surety will not be relieved from liability because the

Special rules of construction.

Difficult questions of construction often arise, where a guarantee limits the pecuniary liability of the surety to a certain fixed sum, as to whether the suretyship is in respect of the whole debt, with a limitation on the liability of the surety, or is applicable to a part only of the debt, co-extensive with the amount of the guarantee. In solving such questions the following principles apply, namely: where a surety gives a continuing guarantee, limited in amount, to secure a floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed, *primâ facie* at least, as applicable to a part only of the debt co-extensive with the amount of the guarantee (*a*), while, on the other hand, a guarantee, limited in amount, for a debt already ascertained, which exceeds that limit, is not *primâ facie* to be construed as a security for part of the debt only, it being for the court to determine in such cases whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only (*b*). Which form of interpretation is adopted in a particular case becomes very important on the bankruptcy of the principal debtor, as upon it depends the extent of the creditor's proof and the surety's right of subrogation (*c*).

Construction where recitals inconsistent with operative part.

908. The operative part of a guarantee is liable to be controlled by the recitals (*d*), at least where the latter are plainly inconsistent therewith (*e*), but not otherwise (*f*), though it seems a covenant of indemnity, unlike a release or guarantee, is not to be restricted by its recitals (*g*). The conditions of fidelity bonds are frequently restrained by the recitals (*h*). So in construing an agreement in the

language of the guarantee carries more than the parties may have contemplated, even though the court may be of opinion that, had the surety understood this, he would not have entered into the guarantee. See *Steele* v. *Hoe* (1849), 14 Q. B. 431; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Chalmers* v. *Victors* (1868), 18 L. T. 481; *Hoad* v. *Grace* (1861), 7 H. & N. 494.

(*a*) *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157, C. A.

(*b*) *Ibid.*; and see *Hobson* v. *Bass* (1871), 6 Ch. App. 792; *Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q. B. 12; *Gray* v. *Seckham* (1872), 7 Ch. App. 680; *Ex parte Rushforth* (1805), 10 Ves. 409; *Thornton* v. *M'Kewan* (1862), 1 Hem. & M. 525.

(*c*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 204.

(*d*) See, generally, *Arlington* (*Lord*) v. *Merricke* (1672), 2 Wms. Saund. (1871 ed.) 813, and notes thereto; *Luning* v. *Milton* (1890), 7 T. L. R. 12; see also cases cited in note (*h*), *infra*.

(*e*) See *Australian Joint Stock Bank* v. *Bailey*, [1899] A. C. 396, P. C.; and see *Sansom* v. *Bell* (1809), 2 Camp. 39; *Saunders* v. *Taylor* (1829), 9 B. & C. 35; *Bank of British North America* v. *Cuvillier* (1861), 4 L. T. 159, P. C.

(*f*) *Australian Joint Stock Bank* v. *Bailey*, *supra*; *Oswald* v. *Berwick-upon-Tweed Corporation* (1856), 5 H. L. Cas. 856.

(*g*) *Re Baker, Collins* v. *Rhodes, Re Seaman, Rhodes* v. *Wish* (1881), 51 L. J. (CH.) 315, C. A., *per* JESSEL, M.R., at p. 320. The other reports of this case do not give this *dictum* of JESSEL, M.R., which, however, is referred to in Seton, Judgments and Orders, 6th ed., Vol. III., at p. 2147

(*h*) See *Arlington* (*Lord*) v. *Merricke*, *supra*; *Peppin* v. *Cooper* (1819), 2 B. & Ald. 431; *Hassell* v. *Long* (1814), 2 M. & S. 363; *St. Saviour's, Southwark* (*Wardens*) v. *Bostock* (1806), 2 Bos. & P. (N. R.) 175; *Stoughton* v. *Day* (1670), Aleyn, 10; *Anderson* v. *Thornton* (1842), 3 Q. B. 271; *North Western*

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form of a bond, in which a surety has become liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly and controlled by reference to the prior clauses specifying the extent of the agency (*i*). Whether in a particular case the condition is capable of being restrained by the recital is not, however, always easy to determine (*k*), though in many cases it will be found that the recital is the proper key to the meaning of the condition in a suretyship bond (*l*). Where a guarantee recites a debt already in existence, express words are required to make it extend to any other debt (*m*). Sometimes the accuracy of a recital may be disputed by the surety (*n*).

Rule applicable where all other rules fail.

909. When all other rules of construction fail (*o*), the rule expressed by the maxim *verba chartarum fortius accipiuntur contra proferentem* is applicable, in cases of ambiguity (*p*), as much to guarantees as to other contracts (*q*), though this was formerly thought not to be the case (*r*). The surety, however, who is a favoured debtor (*s*), must never be charged beyond the precise terms of his engagement (*t*).

Admissibility of parol evidence.

910. Parol evidence of the consideration is not admissible to explain the promise of guarantee where such promise cannot be collected from the written memorandum itself (*a*). Where, however, a written guarantee is ambiguous, parol evidence is admissible to construe its meaning (*b*), but not to alter nor vary in any manner

Rail. Co. v. *Whinray* (1854), 10 Exch. 77; and see also *R.* v. *O'Callaghan* (1838), 1 I. Eq. R. 439; *Liverpool Water Works Co.* v. *Atkinson* (1805), 6 East, 507.

(*i*) *Napier* v. *Bruce* (1842), 8 Cl. & Fin. 470, H. L.

(*k*) *Evans* v. *Earle* (1854), 10 Exch. 1; *Curling* v. *Chalklen* (1815), 3 M. & S. 502; *Parker* v. *Wise* (1817), 6 M. & S. 239.

(*l*) *London Assurance Co.* v. *Bold* (1844), 6 Q. B. 514, *per* WIGHTMAN, J., at p. 526; *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500.

(*m*) See *Pearsall* v. *Summersett* (1812), 4 Taunt. 593; *Sansom* v. *Bell* (1809), 2 Camp. 39; *Plastic Decoration and Papier-Maché Co.* v. *Massey-Mainwaring* (1895), 11 T. L. R. 205.

(*n*) *Kepp* v. *Wiggett* (1850), 10 C. B. 35.

(*o*) Broom's Legal Maxims, 7th ed., p. 441; *Borradaile* v. *Hunter* (1843), 5 Man. & G. 639; *Lindus* v. *Melrose* (1858), 3 H. & N. 177, Ex. Ch.; *Taylor* v. *St. Helens Corporation* (1877), 6 Ch. D. 264, C. A., *per* JESSEL, M.R., at p. 270.

(*p*) *Borradaile* v. *Hunter, supra.* As to the application of this rule, see further, titles CONTRACT, Vol. VII., p. 516; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 441; EVIDENCE, Vol. XIII., p. 427.

(*q*) *Mayer* v. *Isaac* (1840), 6 M. & W. 605; *Mason* v. *Pritchard* (1810), 12 East, 227; *Wood* v. *Priestner* (1867), L. R. 2 Exch. 66, 282, Ex. Ch.; *Hargreave* v. *Smee* (1829), 6 Bing. 244.

(*r*) *Nicholson* v. *Paget* (1832), 1 Cr. & M. 48.

(*s*) See p. 479, *post*, and the cases there cited.

(*t*) See pp. 479 *et seq.*, *post*, and also *Wright* v. *Russel* (1774), 2 Wm. Bl. 934; *Pearsall* v. *Summersett, supra*; *Chalmers* v. *Victors* (1868), 16 W. R. 1046; *Henton* v. *Paddison* (1893), 68 L. T. 405. When an obligation exists solely by virtue of a covenant, its extent is to be measured only by the words of the covenant (*Sumner* v. *Powell* (1816), 2 Mer. 30).

(*a*) *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361; *Sheers* v. *Thimbleby & Son* (1897), 76 L. T. 709, C. A., *per* LOPES, L.J., at p. 711; and see pp. 468, 469, *ante*.

(*b*) Where the words used are susceptible of more than one meaning, extrinsic evidence is admissible to show what were the facts which the negotiating parties had in mind (see *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, P. C.), but not where such words have a definite meaning, acquired by long usage on the

its terms (*c*). Thus it is available to show whether the guarantee refers to a past or future credit (*d*); to indicate what are the surrounding circumstances (*e*), by means of which a guarantee, like any other mercantile contract, is peculiarly susceptible of explanation (*f*); to show what was the position of the contracting parties, but not what was said at the time of giving the guarantee (*g*); also to identify matters referred to in the memorandum of guarantee (*h*), and to show whether a person is really a surety entitled to contribution, or a surety for his co-sureties (*i*). Where, however, a clear meaning appears without any evidence at all, the court will not

part of conveyancers and others (*Henderson* v. *Arthur*, [1907] 1 K. B. 10, C. A.). General evidence as to the meaning of the words of a contract should not be admitted without a distinct averment on the record as to the particular words to which proof is to be directed and the precise technical or trade meaning which is intended to be attributed to them (*Sutton & Co.* v. *Ciceri & Co.* (1890), 15 App. Cas. 144, *per* Lord WATSON, at p. 152; and see *Bainbridge* v. *Wade* (1850), 16 Q. B. 89).

(*c*) *Goldshede* v. *Swan* (1847), 1 Exch. 154, *per* POLLOCK, C.B., at pp. 157, 158; and see *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, C. A.; *Young* v. *Austen* (1869), L. R. 4 C. P. 553.

(*d*) *Goldshede* v. *Swan*, *supra*; *Colbourn* v. *Dawson* (1851), 10 C. B. 765; *Butcher* v. *Steuart* (1843), 11 M. & W. 857; *Edwards* v. *Jevons* (1849), 8 C. B. 436; *Steele* v. *Hoe* (1849), 14 Q. B. 431; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; and see *King* v. *Cole* (1848), 2 Exch. 628; *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309.

(*e*) *Heffield* v. *Meadows* (1869), L. R. 4 C. P. 595; *Wood* v. *Priestner* (1866), L. R. 2 Exch. 66; *Montefiore* v. *Lloyd* (1863), 15 C. B. (N. S.) 203; *Coles* v. *Pack* (1869), L. R. 5 C. P. 65, 70, 71; *Leathley* v. *Spyer* (1870), L. R. 5 C. P. 595; *Brown* v. *Fletcher* (1876), 35 L. T. 165; *Nottingham Hide Co.* v. *Bottrill* (1873), L. R. 8 C. P. 694; *Spark* v. *Heslop* (1859), 1 E. & E. 563, 570; *Laurie* v. *Scholefield* (1869), L. R. 4 C. P. 622; *Plant* v. *Bourne*, [1897] 2 Ch. 281, C. A.; *Morrell* v. *Cowan* (1877), 7 Ch. D. 151, C. A.; *Henton* v. *Paddison* (1893), 68 L. T. 405, 407; *Grahame* v. *Grahame* (1887), 19 L. R. Ir. 249; *Hogarth* v. *Miller, Brother & Co.*, [1891] A. C. 48. In most of the above cases the court had to determine, by reference to the surrounding circumstances, whether a guarantee was a continuing guarantee or not. For the definition of a continuing guarantee, see p. 440, *ante*, and as to the liability of a surety under such a guarantee, see pp. 478 *et seq.*, *post*. In *Chalmers* v. *Victors* (1868), 16 W. R. 1046, a guarantee "for liabilities incurred by A. to B., to the extent of £50," was, having regard to the extrinsic circumstances of the case, held to extend to £41 due from the principal debtor at the date of the guarantee and subsequent advances up to £9 only (and see *Morrell* v. *Cowan*, *supra*). Though, in construing a contract, the court is entitled to look at the surrounding circumstances and other matters which existed at the time of the making of the contract, it is not entitled to look at any negotiations which may previously have taken place (*Taff Vale Rail. Co.* v. *Davis & Sons*, [1894] 1 Q. B. 43, C. A., *per* LOPES, L.J., at p. 54).

(*f*) *Johnston* v. *Nicholls* (1845), 1 C. B. 251, *per* MAULE, J., at p. 269. All documents not under seal must be construed with reference to the surrounding circumstances of which there is evidence not contradicted (*Re Armitage, Ex parte Good* (1877), 5 Ch. D. 46, C. A., *per* JESSEL, M.R., at pp. 58, 59). When we infer the existence of intention from an act or acts not done for the purpose of manifesting it, the surrounding circumstances are looked at to see what light they throw upon the action (Markby, Elements of Law, 6th ed., p. 131).

(*g*) *Laurie* v. *Scholefield*, *supra*, *per* BYLES, J., at p. 626; and see *Taff Vale Rail. Co.* v. *Davis & Sons*, *supra*, *per* LOPES, L.J., at p. 54.

(*h*) *Shortrede* v. *Cheek* (1834), 1 Ad. & El. 57; *Bateman* v. *Phillips* (1812), 15 East, 272; *Brown* v. *Fletcher*, *supra*; *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361, 368; *Macdonald* v. *Longbottom* (1859), 1 E. & E. 977.

(*i*) *Craythorne* v. *Swinburne* (1807), 14 Ves. 160; *Re Denton's Estate, Licenses*

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break in upon the rule which prohibits the variation of a written document by extrinsic evidence (*k*).

Functions of court and jury respectively.

911. Where there are no words of doubtful trade meaning, and the extrinsic facts are not in controversy, the question whether the words used by the parties amount to a contract of guarantee is not for the jury, but for the court alone (*l*). Where, however, a surety has agreed to guarantee a specific sum, it may be left to the jury to say whether this sum comprised money advanced before the date of the guarantee as well as a subsequent advance (*m*). Though the nature of a contract does not depend upon the name given to it (whether it be "insurance" or "guarantee"), but upon the substance thereof (*n*), nevertheless, where a particular contract is described by the parties thereto as a "policy of insurance," this fact will, in construing it, be treated by the court as affording some indication of an intention not to enter into a "guarantee" (*o*).

Part V.—The Liability of the Surety.

SECT. 1.—*Special Characteristics.*

Secondary liability of surety.

912. The liability of the surety is secondary (*p*)—that is to say, it does not arise until another (namely, the principal debtor), whose liability is primary, has made default (*q*). Consequently a creditor cannot, before any default has been committed, bring an action *quia timet* against a surety to force him to set apart money to provide for the possibility of a debt becoming due from the principal

Insurance Corporation and Guarantee Fund, Ltd. v. *Denton*, [1904] 2 Ch. 178, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 189.

(*k*) *London Assurance Co.* v. *Bold* (1844), 6 Q. B. 514, *per* COLERIDGE, J., at p. 525.

(*l*) *Bank of Montreal* v. *Munster Bank* (1876), 11 I. R. C. L. 47, 55; and see *Faber* v. *Lathom (Earl)* (1897), 77 L. T. 168.

(*m*) *Matthews* v. *Bloxsome* (1864), 33 L. J. (Q. B.) 209.

(*n*) *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793. The *dicta* of the Court of Appeal in this case on this subject are unaffected by the reversal of the decision itself by the House of Lords (*Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135); see *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton, supra, per* VAUGHAN WILLIAMS, L.J., at p. 188. See also *Reynolds* v. *Wheeler* (1861), 10 C. B. (N. S.) 561, 566; *Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138, *per* WARRINGTON, J., at p. 147.

(*o*) *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.; see p. 465, *ante*.

(*p*) The liability is "secondary" whenever the promise to be answerable for another does not exonerate the latter from liability but leaves him primarily liable (*Mallet* v. *Bateman* (1865), L. R. 1 C. P. 163, Ex. Ch.).

(*q*) The surety, however, by his guarantee contracts not a contingent, but a present debt (*Atkinson* v. *Grey* (1853), 1 Sm. & G. 577), yet the contract of guarantee has been described as a contract to indemnify the promisee on a contingency (*Sampson* v. *Burton* (1820), 4 Moore (C. P.), 515). Sometimes, however, a guarantee is binding on directors of a public company and not on the company (*Yorkshire Railway Wagon Co.* v. *Maclure* (1882), 21 Ch. D. 309, C. A.; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.), and, moreover, their liability may continue after that of the company has ceased (*Re London Chartered Bank of Australia*, [1893] 3 Ch. 540).

debtor, should the latter make default (*r*), while, on the other hand, a surety is no more justified in placing the whole of his property out of the reach of liability to pay the guaranteed debt than if he were the principal debtor (*s*).

Evidence required in action by creditor against surety.

913. In an action against the surety by the creditor, a judgment or award obtained by the latter against the principal debtor is not evidence against the surety, being *res inter alios acta* (*t*); nor do the principal debtor's admissions of liability dispense with proof by the creditor of the facts admitted (*a*). However, an account delivered by an agent to his employer, charging himself, is evidence against the surety of the agent (*b*). Official books and reports, which the person whose fidelity has been guaranteed is bound to keep as a duty incidental to his office, are, apparently, presumptive evidence against the surety (*c*).

SECT. 2.—*Extent of Liability.*

SUB-SECT. 1.—*As regards Subject-matter.*

The surety's contract is *strictissimi juris*.

914. The surety is regarded as a favoured debtor (*d*). He is entitled, as such, to insist upon a rigid adherence to the terms of

(*r*) *Antrobus* v. *Davidson* (1817), 3 Mer. 569, cited in *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, *per* WRIGHT, J., at p. 524. In determining the value of an estate for estate duty calculation, no deduction is made for debts due from the deceased which are not incurred "wholly for the deceased's own use and benefit," or "for any debt in respect whereof there is a right to reimbursement from any other estate or person" (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a), (b)); and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 210.

(*s*) *Goodricke* v. *Taylor* (1864), 2 De G. J. & Sm. 135, C. A., *per* TURNER, L.J., at p. 141; and see *Re Ridler*, *Ridler* v. *Ridler* (1882), 22 Ch. D. 74, C. A.

(*t*) *Re Kitchin*, *Ex parte Young* (1881), 17 Ch. D. 668, C. A.; and see *Evans* v. *Beattie* (1803), 5 Esp. 26; *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578; *Bacon* v. *Chesney* (1816), 1 Stark. 192. As to this see, generally, title EVIDENCE, Vol. XIII., pp. 420, 483.

(*a*) See *Evans* v. *Beattie*, *supra*; *King* v. *Norman* (1847), 4 C. B. 884. As to the reopening, at the surety's request, of the accounts of an official liquidator which have been carried in and vouched for without notice to the surety, see *Re Birmingham Brewing, Malting and Distilling Co., Ltd.* (1883), 52 L. J. (CH.) 358. In this connection it may be stated that a receipt signed by a surety is not always conclusive evidence against him (*Straton* v. *Rastall* (1788), 2 Term Rep. 366), though a receipt given with full knowledge of all the circumstances depending between the parties is usually regarded as conclusive (*Bristow* v. *Eastman* (1794), 1 Esp. 172).

(*b*) *Lysaght* v. *Walker* (1831), 5 Bli. (N. S.) 1, H. L. Entries of moneys received by a deceased collector of taxes in a book which he kept for his own private convenience are good evidence against his surety, without calling as witnesses the persons from whom such moneys were received (*Middleton* v. *Melton* (1831), 5 Man. & Ry. (K. B.) 264), and in an action against the surety of a bailiff, who has kept back money, a written admission by the latter of the receipt of such money is also available as evidence against the surety (*Perchard and Hamerton* v. *Tindall* (1795), 1 Esp. 394).

(*c*) *Abbeyleix Union Guardians* v. *Sutcliffe* (1890), 26 L. R. Ir. 332; and see *Union Town* v. *Bermes* (1882), 43 American Reports, 369. In an American case a surety was held not to be estopped from contesting the correctness of the voluntary official reports made by the principal debtor as to the amount of moneys in his hands at the commencement of the term which the bond was intended to cover (*Van Sickel* v. *Buffalo County* (1882), 42 American Reports, 753).

(*d*) *Wheatley* v. *Bastow* (1855), 7 De G. M. & G. 261, C. A., *per* TURNER, L.J.,

SECT. 2. **Extent of Liability.**

his (the surety's) obligation by the creditor, and cannot be made liable for more than he has undertaken (*e*); for, though his contract is not, like that of an insurer, *uberrimæ fidei* (*f*), it is one *strictissimi juris* (*g*). Thus, a surety in a bond, conditioned to answer for any balance which may become due from another to a bank, is only liable for a balance which constitutes a legal debt (*h*), while if the surety stipulates that money shall be lent to a principal debtor, the money lent must, apparently, first have reached the creditor's hand, and then have been lent to the principal debtor, to render the surety liable (*i*).

Examples.

Balance due to bank.

Unlimited guarantee in respect of goods.

So, where a guarantee unlimited in amount is given in respect of goods to be supplied to another, there must be a subsequent *bonâ fide* supply, and to a reasonable extent, to render the surety liable (*k*), though, subject to this condition, the amount supplied is discretionary (*l*).

Promissory note.

A promissory note given by a principal and surety for a definite sum, payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note, and not in payment of the balance of an account current between the principal debtor and the creditor, and this presumption, unless disproved, must be fulfilled to render the surety liable (*m*).

Bill of exchange.

A surety who guarantees the payment of a bill of exchange, to be drawn for a specific sum, is not liable, even to the extent of that

at pp. 279, 280; *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch. D. 692, C. A., *per* Lord SELBORNE, L.C., at p. 703; *Blest* v. *Brown* (1862), 8 Jur. (N. S.) 602; *Williamson* v. *Goold* (1823), 1 Bing., 171, *per* DALLAS, C.J., at p. 176. However, in *Re O'Neills, Minors* (1837), Sau. & Sc. 686, O'LOGHLEN, M.R., at p. 687, states that he was never inclined to concur in the principle which distinguishes the surety from the principal debtor, or by which the former is supposed to be regarded in a more favourable light by courts of equity.

(*e*) *Warre* v. *Calvert* (1837), 7 Ad. & El. 143; *Leigh* v. *Taylor* (1827), 7 B. & C. 491; *Smith* v. *Brandram* (1841), 2 Man. & G. 244; *Gordon* v. *Rae* (1858), 8 E. & B. 1065; *Mortgage Insurance Corporation* v. *Pound* (1895), 65 L. J. (Q. B.) 129, H. L.; *Plastic Decoration and Papier-Maché Co.* v. *Massey-Mainwaring* (1895), 11 T. L. R. 205; *Wembley Urban District Council* v. *Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd.* (1901), 17 T. L. R. 516; and see *Luning* v. *Milton* (1890), 7 T. L. R. 12; *Tanner* v. *Woolmer* (1853), 8 Exch. 482.

(*f*) *Seaton* v. *Heath, Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793; *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531; and see *Blest* v. *Brown, supra*; *Morten* v. *Marshall* (1863), 9 Jur. (N. S.) 651; *Stamford, Spalding, and Boston Banking Co.* v. *Ball* (1862), 4 De G. F. & J. 310.

(*g*) *Bacon* v. *Chesney* (1816), 1 Stark. 192; *Stamford, Spalding, and Boston Banking Co.* v. *Ball, supra.*

(*h*) *Swan* v. *Bank of Scotland* (1836), 10 Bli. (N. S.) 627, H. L. As to when money can be said to be due, see *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307, *per* DARLING, J., at p. 314. Due payment does not, of itself, mean "punctual payment" (see *Starkey* v. *Barton*, [1909] 1 Ch. 284).

(*i*) See *Halford* v. *Byron* (1700), Prec. Ch. 178; *Stone* v. *Compton* (1838), 5 Bing. (N. C.) 142; *Burton* v. *Gray* (1873), 8 Ch. App. 932; *Dimmock* v. *Sturla* (1845), 14 M. & W. 758; *Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; *Grahame* v. *Grahame* (1887), 19 L. R. Ir. 249.

(*k*) *Westhead* v. *Sproson* (1861), 6 H. & N. 728; *Boyd* v. *Moyle* (1846), 2 C. B. 644, 650; *Johnston* v. *Nicholls* (1845), 1 C. B. 251; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Wood* v. *Benson* (1831), 2 Cr. & J. 94.

(*l*) *White* v. *Woodward* (1848), 5 C. B. 810.

(*m*) *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L. R. 10 Eq. 467.

sum, on a bill given for a larger sum (*n*), while, on the other hand, a limited guarantee for moneys lent to a specified amount is not invalidated by moneys being lent above such amount, though the surety cannot be made liable beyond the figure prescribed by the guarantee (*o*), and, when the guarantee is so worded, may only be liable for advances once made to the stipulated amount (*p*).

Loan larger than guarantee.

A surety for payment by a husband and wife of the purchase-money of an estate, which, under an agreement, is to be sold to them both, will not be liable if the estate be sold to the husband only (*q*).

Variation in parties to sale.

Where a landlord has waived a notice to quit given by him to a yearly tenant, whereby a new tenancy is created, a surety for payment of the rent, under the original tenancy, is not liable for rent accruing after the time when the notice to quit would have expired (*r*).

Rent under extended term.

Where the consideration for the surety's promise is forbearance to sue, or to continue legal proceedings against, the principal debtor, all stipulations on this subject which constitute part of such consideration must be strictly complied with, or the surety will not be bound (*s*). Neither will a surety for payment of what may be recovered by the plaintiff in an action be held liable if, in a case where the surety bond stipulates that the action shall be defended, judgment is allowed to go by default (*t*).

Forbearance.

915. Where a surety imposes a limit on his own primary liability, without stipulating that the whole indebtedness of the principal debtor shall not exceed it, the following principles of construction apply, namely: (1) Where the guarantee is intended to secure a floating balance, which may in future become due to the creditor, it is deemed *primâ facie* to apply to part only of the debt co-extensive with the surety's prescribed limit of pecuniary liability; (2) where the guarantee be given for a debt already ascertained, which exceeds the pecuniary limit of the guarantee, it is not *primâ facie* to be regarded as a security for a part only of the debt, it being a question of construction in each case whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only (*a*).

Rules of construction where liability limited.

(*n*) *Philips* v. *Astling* (1809), 2 Taunt. 206; and see *Sumner* v. *Powell* (1816), 2 Mer. 30. Where a surety has joined in a bond for £1,000, the subsequent agreement by the creditor that the debt shall be £500 only will not discharge surety (*Croydon Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46, C. A., *per* AMPHLETT, J. A., at p. 51).

(*o*) *Hall* v. *Grose* (1814), cited, Chitty on Commercial Law, Vol. III., p. 323; and see *Williams* v. *Rawlinson* (1825), 3 Bing. 71, 78; *Mason* v. *Pritchard* (1810), 12 East, 227; *Parker* v. *Wise* (1817), 6 M. & S. 239; *R.* v. *O'Callaghan* (1838), 1 I. Eq. R. 439.

(*p*) *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18; and see *Browning* v. *Baldwin* (1879), 40 L. T. 248.

(*q*) *De Brettes* v. *Goodman* (1855), 9 Moo. P. C. C. 466.

(*r*) *Tayleur* v. *Wildin* (1868), 37 L. J. (EX.) 173.

(*s*) *Rolt* v. *Cozens* (1856), 18 C. B. 673; and see, further, the cases cited at pp. 451 *et seq.*, *ante*.

(*t*) *Luning* v *Milton* (1890), 7 T. L. R. 12.

(*a*) *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157, C. A.; *Hobson* v. *Bass* (1871), 6 Ch. App. 792; *Ex parte Rushforth* (1805), 10 Ves. 409; *Bardwell* v. *Lydall*

SECT. 2. Extent of Liability.

Extent of surety's liability.

916. The surety's liability will not be unduly extended. Nevertheless, it comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee (*b*). Thus, a covenant by a surety for the due payment of interest during the continuance of a mortgage security obliges him to pay interest so long as the principal sum remains unpaid, and therefore after default has been made by the principal debtor in payment of the mortgage money on the day prescribed (*c*). Moreover, even after the right to recover the principal sum from a surety has become statute-barred, interest due thereon is sometimes recoverable (*d*).

The recovery of judgment, however, against the principal debtor for the principal sum due apparently operates to relieve the surety from liability to pay future interest (*e*), while the bankruptcy of the principal debtor relieves from further liability a surety who is to continue liable for interest only so long as anything remains due in respect of the principal money (*f*).

Extent of surety's liability at law and in equity.

917. The extent of the surety's liability is, and has always been, the same at law and in equity (*g*). Such liability need not be co-extensive with that of the principal debtor, but, in so far as it exceeds it, is not a suretyship liability at all (*h*).

(1831), 7 Bing. 489; *Paley* v. *Field* (1806), 12 Ves. 435; *Gee* v. *Pack* (1863), 33 L. J. (Q. B.) 49; *Re Garner, Ex parte Holmes* (1839), Mont. & Ch. 301; *Thornton* v. *M'Kewan* (1862), 32 L. J. (CH.) 69; *Gray* v. *Seckham* (1872), 7 Ch. App. 680; *Veitch* v. *National Bank of Scotland* (1907), 44 Sc. L. R. 394. Sometimes the language of a limited guarantee, given to secure a floating balance, clearly indicates an intention that it shall nevertheless apply to the whole debt (*Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q. B. 12; *Re Rees, Ex parte National Provincial Bank of England* (1881), 17 Ch. D. 98, C. A.; *Midland Banking Co.* v. *Chambers* (1869), 4 Ch. App. 398). When such is the case the creditor, in the event of the principal debtor's bankruptcy, is entitled to prove for the whole debt due to him, and until it has been liquidated the surety cannot stand in the creditor's place as to future dividends (*Harrison's Case* (1871), 6 Ch. App. 286; *Lee and Moor's Case* (1868), L. R. 5 Eq. 368).

(*b*) *Ogden* v. *Aspinall* (1826), 7 Dow. & Ry. (K. B.) 637; *Pattison* v. *Belford Union Guardians* (1856), 1 H. & N. 523, Ex. Ch.; *Gwynne* v. *Burnell* (1837), 7 Cl. & Fin. 572, H. L.; *Loveland* v. *Knight* (1828), 3 C. & P. 106; *Melville* v. *Doidge* (1848), 6 C. B. 450; *Saunders* v. *Taylor* (1829), 9 B. & C. 35; *Barber* v. *Mackrell* (1892), 41 W. R. 341, C. A.; *Pybus* v. *Gibb* (1856), 6 E. & B. 902; *Skillett* v. *Fletcher* (1867), L. R. 2 C. P. 469, Ex. Ch.; *Oswald* v. *Berwick-upon-Tweed Corporation* (1856), 5 H. L. Cas. 856.

(*c*) *King* v. *Greenhill* (1843), 6 Man. & G. 59.

(*d*) *Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A., where the guarantee expressly provided that interest in arrear should become principal, and consequently interest accruing due within six years of action brought was recoverable, although the right to recover the advances was gone. Compare *Re FitzGeorge, Ex parte Robson*, [1905] 1 K. B. 462, where a surety who guaranteed the payment of interest on a debenture bond, issued by a company, until repayment of the principal sum, was held liable to make payment of such interest, after the dissolution of the company.

(*e*) *Faber* v. *Lathom (Earl)* (1897), 77 L. T. 168.

(*f*) *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307.

(*g*) *Samuell* v. *Howarth* (1817), 3 Mer. 272, *per* Lord-ELDON, L.C., at p. 278; *Ratcliffe* v. *Graves* (1683), 1 Vern. 196.

(*h*) See Theobald on the Law of Principal and Surety, pp. 3, 66; Bell, Principles of the Law of Scotland, 10th ed., p. 110; and see *Ferry* v. *Burchard* (1852), 21 Connecticut Reports, 597, *per* STORRS, J., at p. 602. By the old Roman

SECT. 2. Extent of Liability

Where, under the guarantee, the liability of the surety equals in extent and amount that of the principal debtor, he makes himself responsible for any loss sustained by the creditor through the principal debtor's default (*i*).

When liability limited to fixed sum.

918. When the surety's liability is limited to a fixed sum, he is not liable for interest on a larger sum (*j*), but he may continue liable for interest after he has ceased to be liable for principal (*k*). As regards the surety's liability for costs, the creditor cannot recover from the surety the cost of fruitless litigation against the principal

law, a suretyship which exceeded the principal obligation, *quantitate, die, loco, conditione, modo*, was wholly void, and not merely *pro tanto* (see Pothier's Law of Obligations, Evans' edition, Vol. I., p. 230; Dig. 46, 1, 16). By existing Civil Codes this subtle strictness of the Roman law has been unanimously rejected (Burge, Law of Suretyship, p. 5), and a guarantee, which exceeds the principal obligation, merely has its limits reduced to those of the latter (see Suretyship, from the Standpoint of Comparative Jurisprudence, by H. A. de Colyar, K.C., Journal of the Society of Comparative Legislation, Vol., VI., pp. 48, 49), for there cannot be more in the accessory than there is in the principal contract (Hunter's Roman Law, 4th ed., p. 571). The Indian Contract Act, 1872 (Act IX. of 1872), by s. 128, provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

(*i*) *Oastler* v. *Round* (1863), 11 W. R. 518. Where a guarantee was given to secure all rent reserved under an agreement which stipulated that the rent payable was to be £325 for the first year, and, in the event of the tenancy being prolonged by the tenant, £350 for the second year, it was held that, reading the agreement together with the guarantee, the latter carried the second year's rent, and was not limited to the first year's rent (*Philip* v. *Ryan* (1901), *Times*, 12th January). As to the extent of the surety's liability, in respect of covenants in a lease, on the lessee's bankruptcy, see *Tuck* v. *Fyson* (1829), 6 Bing. 321. The liability of sureties in a replevin bond is limited to the amount of rent in arrear at the time of the distress and the costs, and they are not liable for subsequent rent (*Ward* v. *Henley* (1827), 1 Y. & J. 285). A surety for the due payment over by a treasurer of a poor law union to the guardians, upon his (the treasurer's) removal from office, of the balances, moneys etc., which shall then be in his possession by virtue of the office, is liable for all money which has actually, or in effect, passed to such treasurer in his official capacity (*Pattison* v. *Belford Union Guardians* (1856), 1 H. & N. 523, Ex. Ch., where in the accounts of the treasurer, for whom the surety was liable, debits and credits were treated and allowed by the auditors as if they were actual payments in cash and therefore covered by the guarantee; compare *Cosford Union Guardians* v. *Grimwade* (1892), 8 T. L. R. 775. When an assurance company gives a bond to the Board of Trade covering any loss or damage occasioned to a bankrupt's estate by any default of the trustee, it is liable to make good the trustee's default in payment of the penal interest exacted from him under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (6), for improper retention of moneys of the estate (*Board of Trade* v. *Employers' Liability Assurance Corporation, Ltd.*, [1910] 2 K. B. 649, C. A.).

(*j*) *Meek* v. *Wallis* (1872), 27 L. T. 650. As regards the surety's liability for interest, see further *Re Dixon, Heynes* v. *Dixon*, [1900] 2 Ch. 561, C. A.; *Ackerman* v. *Ehrensperger* (1846), 16 M. & W. 99; *Re Browne and Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574, C. A.; *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307; and p. 482, *ante*. There is no rule of law that upon a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied (*Cook* v. *Fowler* (1874), L. R. 7 H. L. 27, *per* Lord SELBORNE, at p. 37).

(*k*) *Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A.; *Faber* v. *Lathom* (*Earl*) (1897), 77 L. T. 168; *Re FitzGeorge, Ex parte Robson*, [1905] 1 K. B. 462.

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debtor, unless he has given notice to the surety of his intention to sue the debtor (*l*).

Liability under fidelity guarantees.

A surety's liability for the faithful discharge by another of duties attaching to a particular office does not extend to losses incurred in respect of the performance by the latter of duties ordinarily performed by another official (*m*), or subsequently imposed by statute (*n*). So a policy for the guarantee of the fidelity of an assistant overseer of a parish will not cover defalcations committed by him as clerk of the parish council (*o*).

Under a receiver's recognisance the surety is liable for all sums of money which the receiver himself is properly liable to pay into court or account for (*p*), for interest on any balance found due from him, as well as for such balance (*q*), and for the costs of an attachment against the receiver for not passing his accounts and all costs incurred in discharging him and appointing a new receiver (*r*).

In the case of a committee or receiver of the estate of a lunatic, the surety is not liable for any default made in respect of the receipt of rents and profits after the lunatic's death, the committee or receiver himself not being responsible in that capacity (*s*), but the surety is liable, on the committee making default as such, not only for the balance reported to be due from him, but also for the costs of proceedings taken for enforcing the payment of such balance, although he may have had no notice of the committee's default until after such proceedings had been taken (*t*), for he is liable for everything for which the committee is liable (*u*).

(*l*) *Baker* v. *Garratt* (1825), 3 Bing. 56, *per* BEST, C.J., at p. 60. As to the surety's liability for costs, see further *Hatch, Mansfield & Co.* v. *Weingott* (1906), 22 T. L. R. 366; *Gillett* v. *Rippon* (1829), Mood. & M. 406; *Spark* v. *Heslop* (1859), 1 E. & E. 563; *Keily* v. *Murphy* (1837), Sau. & Sc. 479; *Hornby* v. *Cardwell* (1881), 8 Q. B. D. 329, C. A.; *Greville* v. *Gunn* (1854), 4 I. C. L. R. 201; *Colvin* v. *Buckle* (1841), 8 M. & W. 680.

(*m*) *Wembley Urban District Council* v. *Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd.* (1901), 17 T. L. R. 516.

(*n*) *Bartlett* v. *A.-G.* (1709), Park. 277; and see *Nares* v. *Rowles* (1811), 14 East, 510; *Webb* v. *James* (1840), 7 M. & W. 279; *Kepp* v. *Wiggett* (1850), 10 C. B. 35; *Durham Corporation* v. *Fowler* (1889), 22 Q. B. D. 394, 413; compare *Napier* v. *Bruce* (1842), 8 Cl. & Fin. 470, H. L., where the surety was held not liable for an agent's failure to account for moneys received by him during the term of his agency, but not in pursuance of the particular agency recited in the fidelity bond, though the bond was conditioned for due accounting during the whole time the agent should continue to act as agent as aforesaid.

(*o*) *Cosford Union* v. *Poor Law and Local Government Officers' Mutual Guarantee Association* (1910), 103 L. T. 463.

(*p*) *Re Graham, Graham* v. *Noakes*, [1895] 1 Ch. 66; and see *Re Nugent's Estate*, [1897] 1 I. R. 464. Persons who supply goods on credit to a receiver and manager of a company on whose assets debentures are charged can only claim to be paid out of the net amount of the receiver's indemnity against trade liabilities incurred by him, and should such indemnity be reduced in amount owing to a deficiency in his accounts they cannot hold the receiver's sureties liable for such deficiency, as the suretyship bond is given to secure the estate and not the receiver's creditors (*Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd.* v. *British Power Traction and Lighting Co., Ltd*, [1910] 2 Ch. 470).

(*q*) *Dawson* v. *Raynes* (1826), 2 Russ. 466.

(*r*) *Maunsell* v. *Egan* (1846), 9 I. Eq. R. 283.

(*s*) *Re Walker*, [1907] 2 Ch. 120, C. A.

(*t*) *Re Lockey* (1845), 1 Ph. 509.

(*u*) *Ibid.*, *per* Lord LYNDHURST, L.C., at p. 511.

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The liability of a surety under an administration bond ceases on the completion of the administration, and he cannot be made responsible for losses which subsequently occur (*a*).

Administration bond.

The liability of a principal and his surety on a bond with a penalty cannot exceed such penalty (*b*).

Liability under contract of indemnity.

919. The extent of a person's liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, more or less, by its own facts and circumstances (*c*). However, the holder of an indemnity, when acting within the scope of his authority, is generally entitled to recover all damages which he may be compelled to pay in any legal proceedings in respect of any matter comprised by the indemnity (*d*), which, however, will not be extended beyond its legal operation (*e*), together with all costs incurred in bringing or defending such legal proceedings, if he has acted prudently and has not disobeyed the orders of the indemnifier (*f*). He is also entitled to recover all sums which he has paid to settle such litigation, provided the settlement was either authorised by the indemnifier or else was a prudent one in itself and not actually forbidden by the latter (*g*).

In an action on a general guarantee the only effect of the party indemnified not giving to the indemnifier notice of an action having been brought against the former before compromising it is to let in proof that the compromise was improperly made, which fact it is for the indemnifier to establish (*h*).

(*a*) *Blake* v. *Bayne*, [1908] A. C. 371, P. C.; and see *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53.

(*b*) *Butcher* v. *Churchill* (1808), 14 Ves. 567.

(*c*) See *Hooper* v. *Bromet* (1904), 90 L. T. 234, C. A; *Croydon Rural District Council* v. *Sutton District Water Co.* (1907), 71 J. P. 513; *Webster* v. *Petre* (1879), 4 Ex. D. 127; *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148, C. A.; *Lewis* v. *Smith* (1850), 9 C. B. 610; *Tanner* v. *Woolmer* (1853), 8 Exch. 482.

(*d*) *Ibid.*; and see *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; *Gray* v. *Lewis*, *Parker* v. *Lewis* (1873), 8 Ch. App. 1035; *The Millwall*, [1905] P. 155, C. A.; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413, C. A.

(*e*) *Sumner* v. *Powell* (1816), 2 Mer. 30; affirmed (1823), Turn. & R. 423; *Barnett* v. *Eccles Corporation*, [1900] 2 Q. B. 104, 423, C. A. An indemnity against future proceedings etc. will extend to lawful claims only (*Lewis* v. *Smith*, *supra*).

(*f*) See *Gillett* v. *Rippon* (1829), Mood. & M. 406; *Ibbett* v. *De la Salle* (1860), 6 H. & N. 233; *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; and see *Knight* v. *Hughes* (1828), 3 C. & P. 467; *Blyth* v. *Smith* (1843), 5 Man. & G. 405; *Tindall* v. *Bell* (1843), 11 M. & W. 228; *Lockhart* v. *Reilly*, *Reilly* v. *Lockhart* (1856), 25 L. J. (CH.) 697.

(*g*) If a person has agreed to indemnify another against a particular claim or demand, and an action is afterwards brought in respect thereof, the holder of the indemnity may then give notice to the indemnifier to come in and defend the action, and, should the latter refuse to do so, may compromise at once on the best terms he can and afterwards sue on the indemnity (*Gray* v. *Lewis*, *Parker* v. *Lewis*, *supra*, *per* MELLISH, L.J., at p. 1059). Where, however, a holder of an indemnity compromises an action brought against him, without consulting the indemnifier, the latter may impugn such compromise if improvidently made (see *Smith* v. *Compton* (1832), 3 B. & Ad. 407; *Lewis* v. *Smith*, *supra*).

(*h*) See *Smith* v. *Compton*, *supra*, and the observations on this case in *Great Western Railway* v. *Fisher*, [1905] 1 Ch. 316, *per* BUCKLEY, J., at p. 324.

SECT. 2. **Extent of Liability.**

Indemnities for costs of litigation.

920. Generally, if not invariably, the costs of the litigation in which the liability indemnified against has been established are given to the holder of the indemnity, especially where the indemnifier has been brought in as a third party, and might have saved the costs by admitting liability (*i*). In the absence of special circumstances, a person indemnifying another against the costs of an action must pay them as between party and party, and is not obliged to pay them as between solicitor and client (*k*).

If, at the date of the entering into the indemnity, litigation is pending, the indemnity will not be construed as implying a promise to pay the costs of that litigation, in the absence of any encouragement given to the person indemnified to continue such litigation (*l*). Moreover, a person who has agreed to indemnify another from a liability is not, *primâ facie*, liable to pay to the person indemnified the costs incurred by the latter in an unsuccessful appeal from the judgment of a court of first instance establishing his liability (*m*).

Where one person, at the request of another, commences an action for the latter's benefit, he may maintain an action against the latter for costs due to the solicitor conducting the action before paying such costs (*n*).

Allowable deductions.

921. In estimating the loss occasioned by the principal debtor's default the creditor must give credit for sums received by him from the principal debtor (*o*), or paid by the surety to keep up a security for the guaranteed debt (*p*), and he is not entitled to the benefit of any counter security received by the surety from the principal debtor (*q*).

(*i*) *The Millwall*, [1905] P. 155, C. A., *per* COZENS-HARDY, L.J., at p. 176; and see *Murrell* v. *Fysh* (1883), Cab. & El. 80; *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148, C. A.; *Prince of Wales Dry Dock Co.* (*Swansea*), *Ltd.* v. *Fownes Forge and Engineering Co., Ltd.* (1904), 90 L. T. 527, C. A.; *Broom* v. *Hall* (1859), 7 C. B. (N. S.) 503. Thus, if two trustees are held liable for breach of trust, and, as between them, one is primarily liable, he is bound to indemnify his co-trustee against the amount which the latter has to pay to the trust estate, including the costs incurred (*The Millwall*; *supra*, citing *Lockhart* v. *Reilly*, *Reilly* v. *Lockhart* (1856), 25 L. J. (CH.) 697; *Re Linsley*, *Cattley* v. *West*, [1904] 2 Ch. 785; and see title TRUSTS AND TRUSTEES). As to liability of a sub-lessee to his lessor for costs recovered from the latter by the superior landlord where no covenant or agreement for indemnity is obtained from the sub-lessee, see *Clare* v. *Dobson*, [1911] 1 K. B. 35.

(*k*) *Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342; *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; *Re Wells and Croft*, *Ex parte Official Receiver* (1895), 72 L. T. 359; *Barnett* v. *Eccles Corporation*, [1900] 2 Q. B. 423, C. A.; but see *Great Western Railway* v. *Fisher*, [1905] 1 Ch. 316, where distinction is drawn between cases where a person is entitled by contract to an indemnity and cases in which a person is simply recovering damages, in which latter cases he would not in general get his solicitor and client costs, although he would in the former.

(*l*) *Potter* v. *London County Council* (1905), 70 J. P. 35.

(*m*) *Maxwell* v. *British Thomson Houston Co.*, *supra*; see also *Furness*, *Withy & Co.* v. *Hall* (*J. E.*) *& Co.* (1909), 25 T. L. R. 233.

(*n*) *Bullock* v. *Lloyd* (1825), 2 C. & P. 119.

(*o*) *Burnand* v. *Rodocanachi* (1882). 7 App. Cas. 333, *per* Lord BLACKBURN, at pp. 339, 341; *Bardwell* v. *Lydall* (1881), 7 Bing. 489; *Gee* v. *Pack* (1863), 33 L. J. (Q. B.) 49; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A.; *Randal* v. *Cockran* (1748), 1 Ves. Sen. 98; and see *Re Bedell*, *Ex parte Gilbey* (1878), 8 Ch. D. 248, C. A.

(*p*) *Aylwin* v. *Witty* (1861), 30 L. J. (CH.) 860.

(*q*) *Re Walker*, *Sheffield Banking Co.* v. *Clayton*, [1892] 1 Ch. 621.

SUB-SECT. 2.—*In Point of Time.*

SECT. 2. Extent of Liability.

(i.) *When the Liability arises.*

When liability arises.

922. Once the principal debtor has made default, but not till then, the liability of the surety arises (*r*), and thereafter the surety cannot, as against the creditor seeking to recover payment, set up an adverse claim of any kind (*s*).

What constitutes a default.

To render the surety liable, the default relied upon must not be due to the creditor's misconduct (*t*) or connivance (*a*), nor result from *vis major*, such as robbery with irresistible violence (*b*).

It is not always easy to determine whether, in a particular case, a default has been committed, and a reference to previous decisions on the subject is often of some assistance (*c*).

Notice of default unnecessary.

923. Notice of the principal debtor's default need not be given to the surety (*d*), and he is liable without being requested to

(*r*) *Belford Union Guardians* v. *Pattison* (1856), 11 Exch. 623; affirmed, *sub nom. Pattison* v. *Belford Union Guardians* (1856), 1 H. & N. 523, Ex. Ch.; *Wright* v. *Simpson* (1802), 6 Ves. 714, 733; *Barber* v. *Mackrell* (1892), 68 L. T. 29, 31, C. A. As to the meaning of the word "default" in the Statute of Frauds (29 Car. 2, c. 3), s. 4, see note (*s*), p. 455, *ante*.

(*s*) *Re Binns, Lee* v. *Binns*, [1896] 2 Ch. 584, *per* NORTH, J., at p. 588.

(*t*) *Halliwell* v. *Counsell* (1878), 38 L. T. 176; *Blest* v. *Brown* (1862), 4 De G. F. & J. 367.

(*a*) See *Dawson* v. *Lawes* (1854), Kay, 280; *Mactaggart* v. *Watson* (1835), 3 Cl. & Fin. 525, H. L.; *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288; *Sanderson* v. *Aston* (1873), L. R. 8 Exch. 73; *Blest* v. *Brown, supra*; *Lodder* v. *Slowey*, [1904] A. C. 442, P. C.

(*b*) *Walker* v. *British Guarantee Association* (1852), 18 Q. B. 277; see also *King* v. *Cole* (1848), 2 Exch. 628. The surety of a clerk is liable for money accidentally lost by the latter when out riding in his employer's service (*Melville* v. *Doidge* (1848), 6 C. B. 450; see also *Saunders* v. *Taylor* (1829), 9 B. & C. 35; *Hornsby* v. *Slack* (1850), 1 I. C. L. R. 126).

(*c*) Thus, a special resolution of a company postponing payment of debentures to a certain stated time undoubtedly constitutes a "default" in payment thereof within the meaning of a policy guaranteeing due payment of the principal and interest secured by such debentures (*Finlay* v. *Mexican Investment Corporation* (1896), 13 T. L. R. 63). So the conversion to his own use by an administrator of a large portion of an intestate's assets is a breach of a condition in an administration bond well and truly to administer the goods of the intestate according to law (*Canterbury* (*Archbishop*) v. *Robertson* (1833), 1 Cr. & M. 690; and see *Dobbs* v. *Brain* (1892), 8 T. L. R. 630, C. A.; *Blake* v. *Bayne*, [1908] A. C. 371, P. C.). In the case of a bond given by a collector and his sureties to the Commissioners of Land and Assessed Taxes under stat. (1803) 43 Geo. 3, c. 99 (repealed by Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 4), the condition was considered broken if the taxes collected in any one year were not duly paid by the collector to the account of the year, but were in whole or in part appropriated by the collector, and received by the commissioners, in satisfaction of the arrears of a former year (*Gwynne* v. *Burnell* (1840), 7 Cl. & Fin. 572, H. L., reversing S. C. *sub nom. Collins* v. *Gwynne* (1833), 9 Bing. 544; *sub nom. Gwynne* v. *Burnell* (1835), 2 Bing. (N. C.) 7, Ex. Ch.). A mere error in book-keeping by a clerk is not, however, a default rendering a surety liable (*Jephson* v. *Howkins* (1841), 2 Man. & G. 366), unless, of course, the guarantee stipulates that it shall be so considered. As to default by a purchaser who has paid a deposit to the vendor to guarantee the fulfilment of the contract between them, see *Sprague* v. *Booth*, [1909] A. C. 576, P. C.

(*d*) *Cutler* v. *Southern* (1667), 1 Wms. Saund. 115; *Ker* v. *Mitchell* (1786), 2 Chit. 487; *Batson* v. *Spearman* (1838), 9 Ad. & El. 298; *Carr* v. *Browne* (1826), 12 Moore (C. P.), 62; *Hitchcock* v. *Humfrey* (1843), 5 Man. & G. 559; *Warrington* v. *Furbor* (1807), 8 East, 242; *Walton* v. *Mascall* (1844), 13 M. & W. 452; *Carter* v. *White* (1883), 25 Ch. D. 666, C. A.; *Holbrow* v. *Wilkins* (1822), 1

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Prior proceedings against debtor unnecessary.

pay (*e*), in the absence of a stipulation to the contrary, express (*f*) or implied (*g*), or of circumstances rendering a demand upon him a legal obligation (*h*). Nor is it necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay (*i*), or to sue him, though solvent (*k*), unless this be expressly stipulated for (*l*). Nor is it necessary for the creditor to prosecute the principal debtor for any felony he may have committed (*m*), unless

B. & C. 10; *Van Wart* v. *Woolley* (1824), 3 B. & C. 439; *Britannia Steamship Insurance Association* v. *Duff* (1909), 46 Sc. L. R. 894.

(*e*) *Hitchcock* v. *Humfrey* (1843), 5 Man. & G. 559; *Rede* v. *Farr* (1817), 6 M. & S. 121; *Lilley* v. *Hewitt* (1822), 11 Price, 494.

(*f*) As where, for instance, the surety has covenanted to pay "on demand" (*Re Brown's* (*J.*) *Estate, Brown* v. *Brown*, [1893] 2 Ch. 300; see also *Batson* v. *Spearman* (1838), 9 Ad. & El. 298; *Hartland* v. *Jukes* (1863), 1 H. & C. 667; *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9). Where there is a present debt and a promise to pay on demand, the demand is not held to be a condition precedent to bringing an action (see p. 489, *post*), but on a promise to pay a collateral sum on request the request must be made before action brought (see *Re Brown's* (*J.*) *Estate, Brown* v. *Brown*, *supra*; *Knox* v. *Gye* (1867), 16 L. T. 76, *per* Lord CHELMSFORD, L.C., at p. 81; *Payne* v. *Ives* (1823), 3 Dow. & Ry. (K. B.) 664; *Martin* v. *Wright* (1845), 6 Q. B. 917; *Rickaby* v. *Lewis* (1905), 22 T. L. R. 130; *Phillips* v. *Fordyce* (1779), 2 Chit. 676).

(*g*) See *Morten* v. *Marshall* (1863), 9 Jur. (N. S.) 651.

(*h*) See *Payne* v. *Ives*, *supra*. A surety for payment by the acceptor of a bill or note is liable, though there has been no presentment (see *Warrington* v. *Furbor* (1807), 8 East, 242; *Walton* v. *Mascall* (1844), 13 M. & W. 452). Unreasonable neglect, however, on the part of the holder of a bill or note to present the same or to give notice of dishonour may, it seems, discharge from all liability a surety damnified by such neglect (see *Philips* v. *Astling* (1809), 2 Taunt. 206; *Van Wart* v. *Woolley* (1824), 3 B. & C. 439, *per* ABBOTT, C.J., at p. 447; *Peacock* v. *Pursell* (1863), 14 C. B. (N. S.) 728).

(*i*) *Belfast Banking Co.* v. *Stanley* (1867), 15 W. R. 989; *Rede* v. *Farr* (1817), 6 M. & S. 121; *Walton* v. *Mascall* (1844), 13 M. & W. 452; *Lilley* v. *Hewitt*, *supra*; *Warrington* v. *Furbor*, *supra*; *Holbrow* v. *Wilkins* (1822), 1 B. & C. 10; *Re Brown's* (*J.*) *Estate, Brown* v. *Brown*, *supra*; *Sheldon and Ackhoff* v. *Milligan* (1907), 14 Scots Law Times, 703.

(*k*) *Re Lockey* (1845), 1 Ph. 509; *Wright* v. *Simpson* (1802), 6 Ves. 714, 733; *Jackson* v. *Digby* (1854), 2 W. R. 540; but see *Ewart* v. *Latta* (1865), 4 Macq. 983, H. L., *per* Lord WESTBURY, L.C., at p. 986; *Law* v. *East India Co.* (1799), 4 Ves. 824. If a surety does not intend to be liable until after failure to recover from the principal debtor, the guarantee should so state; otherwise, in the absence of fraud, the surety will be liable (*Palmer* v. *Sheridan-Beckers* (1910), *Times*, 20th January). The provision in Magna Charta, 1297 (25 Edw. 1, c. 8), that neither shall the pledges of the debtor be distrained as long as the principal is sufficient for payment of the debt applies only to pledgors and nuncupators who, by express words, are not responsible unless their principals become insolvent and so are conditional debtors only (see *A.-G.* v. *Resby* (1664), Hard. 377; *A.-G.* v. *Atkinson* (1827), 1 Y. & J. 207, 212; *R.* v. *Fay* (1879), 4 L. R. Ir. 606, 618, C. A.).

(*l*) *Holl* v. *Hadley* (1835), 2 Ad. & El. 758; *Bank of Ireland* v. *Beresford* (1818), 6 Dow, 233, H. L., *per* Lord ELDON, L.C., at p. 238. Where a deed provided that a surety for an acceptor should not be sued on the bills until the acceptor's effects should have been sold and the proceeds applied in discharge of the bills, and afterwards such effects were seized and sold under a commission of bankruptcy, the trustee, to whom they had been conveyed by the deed in question, having, with the knowledge and assent of the surety, omitted to take possession of them in time, it was held that the surety could nevertheless be sued on and was liable in respect of the bills (*Lancaster* v. *Harrison* (1830), 6 Bing. 726). The same principle applies even where a statute requires the creditor ultimately to sue the defaulting principal debtor (*Wilks* v. *Heeley* (1832), 1 Cr. & M. 249).

(*m*) *Lee* v. *Bayes* (1856), 18 C. B. 599.

this be rendered essential by the terms of the guarantee (*n*), nor to resort to securities for the guaranteed debt received by the creditor from the principal debtor (*o*), though, in certain special circumstances, it may be necessary for the creditor, before having recourse to the surety, to seek indemnity from a third person (*p*).

Conditions precedent must be fulfilled.

924. Any conditions precedent to the surety's liability must be fulfilled before recourse can be had to him (*q*). Where, as frequently happens, it is a condition precedent that a guarantee shall be executed by certain named persons as co-sureties, it is the duty of the creditor to see that it is executed by the proper parties, and the known insolvency of one of such parties does not dispense with the duty of obtaining his execution thereof (*r*), for all the proposed sureties must execute it or none are liable (*s*).

Similarly, where a surety stipulates that the principal debtor

(*n*) *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911.

(*o*) *Ranelaugh (Earl)* v. *Hayes* (1683), 1 Vern. 189; *Wilks* v. *Heeley* (1832), 1 Cr. & M. 249; *Re Howe, Ex parte Brett* (1871), 6 Ch. App. 838, 841. Even where the guarantee expressly stipulated that, before the surety could be called upon to pay, the creditor must have availed himself to the utmost of any *bonâ fide* securities which he held of the principal debtor, and it was proved that the creditor had neglected to adopt means to enforce payment of a bill by a party who was shown to be totally insolvent, it was held that the surety was not relieved from liability (*Muskett* v. *Rogers* (1839), 8 Scott, 51; and see also *Collins* v. *Gwynne* (1833), 9 Bing. 544, reversed in H. L.; see note (*l*), p. 458, *ante*).

(*p*) *Cottin* v. *Blane* (1795), 2 Anst. 544; Story, s. 639.

(*q*) See, generally, *Hemming* v. *Trenery* (1835), 2 Cr. M. & R. 385; *Moor* v. *Roberts* (1858), 3 C. B. (N. S.) 830; *Hill* v. *Nuttall* (1864), 17 C. B. (N. S.) 262; *Elworthy* v. *Maunder* (1828), 2 Moo. & P. 482; *Mortgage Insurance Corporation* v. *Pound* (1894), 64 L. J. (Q. B.) 394, C. A.; *Pearse* v. *Morrice* (1834), 2 Ad. & El. 84; *Burton* v. *Gray* (1873), 8 Ch. App. 932; *Lawrence* v. *Walmsley* (1862), 12 C. B. (N. S.) 799; *Phillips* v. *Fordyce* (1779), 2 Chit. 676; *Rickaby* v. *Lewis* (1905), 22 T. L. R. 130; *Wilson* v. *Bevan* (1849), 7 C. B. 673; *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 2 Smith, L.C., 11th ed., p. 1. Where, in a written contract, it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect (*Mackay* v. *Dick* (1881), 6 App. Cas. 251, *per* Lord BLACKBURN, at p. 263; and see *Sprague* v. *Booth*, [1909] A. C. 576, P. C.); see, generally, title CONTRACT, Vol. VII. pp. 432 *et seq.*

(*r*) *Fitzgerald* v. *M'Cowan*, [1898] 2 I. R. 1.

(*s*) See *National Provincial Bank of England* v. *Brackenbury* (1906), 23 T. L. R. 797; *Emmet* v. *Dewhurst* (1851), 3 Mac. & G. 587; *Evans* v. *Bremridge* (1855), 2 K. & J. 174; *West Riding Union Banking Co., Ltd.* v. *Elmore* (1905), *Times*, 24th February; *Fitzgerald* v. *M'Cowan, supra*; *Re Cowardine* (1905), *Times*, 21st December; *Hansard* v. *Lethbridge* (1892), 8 T. L. R. 346, C. A. Where A. executed a bond, as the joint and several bond of himself and B., and signed it "A. and B.," having no authority to do so, the bond was held to be a good several bond of A. (*Elliot* v. *Davis* (1800), 2 Bos. & P. 338). Where a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the jury are satisfied that such person, knowing the facts, and being aware of his rights, had consented to waive the objection (*Leaf* v. *Gibbs* (1830), 4 C. & P. 466; and see *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75, where a surety was held not to be liable on a bond, inasmuch as he only undertook the liability under a contract in which other sureties were joined, and that contract being void in respect of the other sureties was necessarily also void as against him).

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shall execute a particular instrument, this is a condition precedent requiring fulfilment (*t*). In such case, however, the surety will not be discharged from liability if the principal debtor, though he has not executed the suretyship bond, has executed an instrument on which the surety may sue him and become his specialty creditor (*a*).

Conditions which do and do not require fulfilment.

Where there is no real condition precedent requiring a guarantee or other instrument to be signed by particular persons, the surety will not be relieved from liability by the omission to sign of persons he merely thought or assumed would sign (*b*). On the other hand, a person becoming a surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the creditor is entitled to the benefit of that real and substantial security in the event of his being called upon as surety to pay the debt for which he has become bound (*c*).

Where the surety stipulates for forbearance for a stated time to sue or exact payment from the principal debtor, this stipulation must be exactly fulfilled, or the surety will not be liable (*d*).

Similarly, a stipulation that goods shall be supplied, or advances made to the principal debtor, must be fulfilled, as being a condition precedent to the surety's liability (*e*).

Where a surety promises to indemnify another from costs if he will stay proceedings against a third person and sue someone designated, the mere stay of proceedings will entitle the promisee to enforce the indemnity (*f*).

(*t*) *Cooper* v. *Evans* (1867), L. R. 4 Eq. 45.

(*a*) *Ibid.* In the case of a policy of insurance, the condition requiring its execution by specified persons should, to be binding, appear on the face thereof (*Anglo-Californian Bank, Ltd.* v. *London and Provincial Marine and General Insurance Co., Ltd.* (1904), 20 T. L. R. 665).

(*b*) See *Coyte* v. *Elphick* (1874), 22 W. R. 541, 544; *Lawrence* v. *Harris* (1902), *Times*, 10th March; *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, P. C.; *Traill* v. *Gibbons* (1861), 2 F. & F. 358; *Horne* v. *Ramsdale* (1842), 9 M. & W. 322; *Dallas* v. *Walls* (1874), 29 L. T. 599.

(*c*) *Wulff* v. *Jay* (1872), L. R. 7 Q. B. 751, *per* HANNEN, J., at p. 763.

(*d*) See pp. 451, 452, *ante*, and the cases there cited; see also *Rolt* v. *Cozens* (1856), 18 C. B. 673. It has, however, been held in Scotland that where a guarantee stipulates that no payment of the principal sum to which it relates shall be demanded before a certain date, breach of this stipulation does not discharge the surety (see *London and Midland Bank, Ltd.* v. *Forrest* (1899), 2 F. (Ct. of Sess.) 179).

(*e*) *Westhead* v. *Sproson* (1861), 6 H. & N. 728; *Boyd* v. *Moyle* (1846), 2 C. B. 644, 650; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Johnston* v. *Nicholls* (1845), 1 C. B. 251; *Wood* v. *Benson* (1831), 2 Cr. & J. 94; *Hartland* v. *Jukes* (1863), 1 H. & C. 667, *per* POLLOCK, C.B., at p. 675.

(*f*) *Wilson* v. *Bevan* (1849), 7 C. B. 673. On the other hand, where leave to defend an action is given to a defendant, on his joining in a bond with two sureties, conditioned for the payment of such sum as shall be recovered in such action, and afterwards, owing to the bankruptcy of one of such sureties and failure on the part of the defendant to comply with an order requiring him to find another surety in his place, judgment by default is signed against him, the solvent surety is discharged from liability, where, at least, the recital in the surety bond shows that the party contemplated that the action was to be defended and that the sureties were only to become liable if the defence failed (*Luning* v. *Milton* (1890), 7 T. L. R. 12). In this case, however, CHARLES, J., said that he did not decide that the parties must go through all the proceedings up to trial, but that as, through no fault of the surety but through the bankruptcy of his co-surety, and an order of which he had no notice, his position as

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A surety who agrees to pay the creditor within a stated period after the receipt by the principal debtor of a written notice demanding payment from him is nevertheless discharged from liability where the giving of such notice is no longer possible owing to the death of the principal debtor (*g*).

A surety for payment of a promissory note, across which words are written making it payable at a particular place, is liable though presentation is not made at such place, because such words, to be effectual, should be in the body of the note (*h*). Failure by an employer to comply with statutory directions in his dealings with the employed will not necessarily discharge the latter's surety, where such directions are not clearly imperative but are merely permissive (*i*).

Notice of waiver of condition.

Notice should be given to the surety, by or on behalf of the creditor, of the waiver by the latter of any stipulation introduced for the creditor's benefit, and on the non-fulfilment of which the guarantee was to be given up (*k*).

When liability under fidelity guarantee arises.

925. In the case of a guarantee for the good behaviour of another in an office or employment, the liability of the surety does not commence till the principal has been legally appointed thereto (*l*), and should a fidelity bond recite the due appointment of the latter to a particular office his surety may dispute the accuracy of such recital (*m*).

(ii.) *Duration of the Liability.*

Duration of the surety's liability.

926. The duration of the surety's liability depends upon the nature of the guarantee (*n*). Some guarantees are intended to cover a single credit and transaction only, while others called "continuing guarantees" (*o*) are framed so as to apply to a series

surety had been altered without his consent, the surety was clearly discharged from liability under the bond.

(*g*) *Rickaby* v. *Lewis* (1905), 22 T. L. R. 130; and see *Bonser* v. *Cox* (1841), 4 Beav. 379; *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.* (1887), 19 Q. B. D. 237.

(*h*) *Stevenson* v. *Brown* (1902), 18 T. L. R. 268.

(*i*) *Gwynne* v. *Burnell* (1840), 7 Cl. & Fin. 572, H. L.

(*k*) *Morten* v. *Marshall* (1863), 2 H. & C. 305.

(*l*) *Kepp* v. *Wiggett* (1850), 10 C. B. 35; *Holland* v. *Lea* (1854), 9 Exch. 430; *Nares* v. *Rowles* (1811), 14 East, 510; *Webb* v. *James* (1840), 7 M. & W. 279.

(*m*) *Kepp* v. *Wiggett*, *supra*.

(*n*) As to the duration of a surety's liability under an administration bond, see *Blake* v. *Bayne*, [1908] A. C. 371, P. C. Thus, where a bond on the face of it appears to be a simple money bond to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not a floating balance (*Walker* v. *Hardman* (1837), 4 Cl. & Fin. 258, H. L.; *Re Medewe's Trust* (1859), 26 Beav. 588). On the other hand, a guarantee given to secure "whatever may be owing" up to the pecuniary limit of the surety's prescribed liability applies, *primâ facie*, at least, not to a specific and ascertained sum, already due to the creditor from the principal debtor at the date of the guarantee, but to what may afterwards become due (*Wood* v. *Priestner* (1867), L. R. 2 Exch. 66, 282, Ex. Ch.). The words "whatever may be owing" are, apparently, descriptive not so much of a present debt as of something to become due hereafter (*ibid.*).

(*o*) For the definition of a continuing guarantee, see p. 440, *ante*. In the case of a guarantee to cover advances, the effect of the word "continuing" is

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of credits and transactions. In the former case the surety's liability extends only to the one credit or transaction agreed upon, while in the latter it endures until the credits and transactions contemplated by the parties, and covered by the guarantee, have been exhausted or until the guarantee itself has been revoked (*p*). It is often difficult to determine to which class a particular guarantee belongs. In cases of ambiguity the surrounding circumstances by means of which mercantile contracts such as guarantees are more peculiarly susceptible of explanation (*q*) may be looked at to see what was the subject-matter which the parties had in their contemplation when the guarantee was given, and for this purpose recourse may be had to parol evidence (*r*). Being thus satisfied as to what was the intention of the parties, the language of the guarantee must then be examined, in order to see whether it is capable of being construed so as to carry out such intention (*s*). As the language of guarantees and the subject-matter thereof and the surrounding circumstances differ in almost every case, the question whether a guarantee is continuing or not cannot be determined by fixed rules of construction (*t*) nor by reference to decided cases.

Method of construction.

Mercantile or trade guarantees.

927. Mercantile or trade guarantees are usually given either to secure the supply of goods on credit or advances of money, and may be limited in amount (*a*), or absolutely unlimited (*b*), so far as

not to give a fresh right of action from day to day against the surety, but to extend the guarantee beyond the original advance to subsequent advances (*Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A., *per* RIGBY, L.J., at p. 466).

(*p*) As to revocation of guarantees, see p. 570, *post*.

(*q*) *Johnston* v. *Nicholls* (1845), 1 C. B. 251, *per* MAULE, J., at p. 269; see p. 477, *ante*.

(*r*) *Heffield* v. *Meadows* (1869), L. R. 4 C. P. 595, *per* WILLES, J., at p. 599; and see *Wood* v. *Priestner* (1867), L. R. 2 Exch. 66, 282, Ex. Ch.; *Nottingham Hide Co.* v. *Bottrill* (1873), L. R. 8 C. P. 694; *Chalmers* v. *Victors* (1868), 16 W. R. 1046; *Laurie* v. *Scholefield* (1869), L. R. 4 C. P. 622; *Steele* v. *Hoe* (1849), 14 Q. B. 431; *Grahame* v. *Grahame* (1887), 19 L. R. Ir. 249; *Hoad* v. *Grace* (1861), 7 H. & N. 494; *Edwards* v. *Jevons* (1849), 8 C. B. 436; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Hogarth* v. *Miller, Brother & Co.*, [1891] A. C. 48, 53; titles CONTRACT, Vol. VII., pp. 511 *et seq.*; CUSTOM AND USAGES, Vol. X., pp. 261 *et seq.*; EVIDENCE, Vol. XIII., pp. 444 *et seq.*

(*s*) *Heffield* v. *Meadows*, *supra*, *per* WILLES, J., at p. 599. If a party means to be surety only for a single dealing, he should take care to say so (*Merle* v. *Wells* (1810), 2 Camp. 413, *per* Lord ELLENBOROUGH, at p. 414).

(*t*) *Coles* v. *Pack* (1869), L. R. 5 C. P. 65, *per* BOVILL, C.J., at p. 70.

(*a*) See *Laurie* v. *Scholefield*, *supra*; *Wood* v. *Priestner*, *supra*; *Heffield* v. *Meadows*, *supra*; *Beckett* v. *Addyman* (1882), 9 Q. B. D. 783, C. A.; *Coles* v. *Pack*, *supra*; *Harriss* v. *Fawcett* (1873), 8 Ch. App. 866; *R.* v. *O'Callaghan* (1839), 1 I. Eq. R. 439; *Grahame* v. *Grahame*, *supra*; *Parker* v. *Wise* (1817), 6 M. & S. 239; *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch. D. 692, C. A.; *Bradbury* v. *Morgan* (1862), 1 H. & C. 249; *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157, C. A.; *Batson* v. *Spearman* (1838), 9 Ad. & El. 298; *Browning* v. *Baldwin* (1879), 40 L. T. 248; *Mason* v. *Pritchard* (1810), 12 East, 227; *Boyd* v. *Robins* (1859), 5 C. B. (N. S.) 597; *Bastow* v. *Bennett* (1812), 3 Camp. 220; *Allan* v. *Kenning* (1833), 9 Bing. 618; *Mayer* v. *Isaac* (1840), 6 M. & W. 605; *Martin* v. *Wright* (1845), 6 Q. B. 917.

(*b*) See *Hitchcock* v. *Humfrey* (1843), 5 Man. & G. 559; *Nottingham Hide Co.* v. *Bottrill*, *supra*; *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A.; *Calvert* v. *Gordon* (1828), 3 Man. & Ry. (K. B.) 124; *Coulthart* v. *Clementson* (1879), 5 Q. B. D. 42; *Re Silvester*

the surety's liability thereunder is concerned. Where there is a prescribed pecuniary limit, the guarantee, if continuing, is not exhausted by the first advance or credit equal to the prescribed amount (*c*), but a guarantee, though continuing and limited to a certain given sum, may, and sometimes does, stipulate that the surety shall only be liable for a definite period of time and not longer (*d*), in which case, as where it is given as security for the acceptor of bills, it is often a nice question of construction whether it covers transactions completed, but not matured, during the time limit (*e*).

Framing of non-continuing guarantee.

928. Whatever be the nature of the guarantee, if it be intended to limit its scope and operation to a single transaction, great care should be taken in framing it (*f*), and in the avoidance of words consistent with or more suitable to an intention on the part of the surety to extend his responsibility to several transactions rather than limit it to one transaction only (*g*).

Midland Rail. Co. v. *Silvester*, [1895] 1 Ch. 573; and see *Australian Joint Stock Bank* v. *Bailey*, [1899] A. C. 396, P. C.

(*c*) *Williams* v. *Rawlinson* (1825), Ry. & M. 233; *Mason* v. *Pritchard* (1810), 12 East, 227; *Laurie* v. *Scholefield* (1869), L. R. 4 C. P. 622; *Mayer* v. *Isaac* (1840), 6 M. & W. 605; *Whelan* v. *Keegan* (1858), 7 I. C. L. R. 544; *Hitchcock* v. *Humfrey* (1843), 5 Man. & G. 559; and see *Australian Joint Stock Bank* v. *Bailey*, *supra*. It was held in *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18, that a bond by A. and B. to C. to enable A. to carry on his trade, conditioned for payment of all such sums, not exceeding £3,000, which should at any time thereafter be advanced by C., is not a continuing security to the extent of £3,000 for advances made at any time, but extends only to an advance once made to that extent.

(*d*) *Laurie* v. *Scholefield*, *supra*.

(*e*) See *Hollond* v. *Teed* (1848), 7 Hare, 50, where the guarantee was held to apply to bills accepted before but not payable till after its termination. Apparently a guarantee for payment of goods to be supplied will cover goods contracted for the day before it was given and subsequently supplied; and see *Simmons* v. *Keating* (1818), 2 Stark. 426; title BANKERS AND BANKING, Vol. I., p. 641; Chitty's Commercial Law, Vol. III., p. 323.

(*f*) See *Merle* v. *Wells* (1810), 2 Camp. 413. For forms of continuing and non-continuing guarantees, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 191 *et seq.* Where a mortgage is given to cover advances made to a customer by a bank, care should be taken in framing it so as to indicate clearly whether it is intended to be of a continuing character or not and to cover present and future advances or not (see *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29; *Bank of Africa* v. *Salisbury Gold Mining Co.*, [1892] A. C. 281, P. C.; *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450, *per* MALINS, V.-C., at p. 459). As to bank guarantees, see, generally, title BANKERS AND BANKING, Vol. I., pp. 639 *et seq.*

(*g*) For examples of "continuing" guarantees, see *Heffield* v. *Meadows* (1869), L. R. 4 C. P. 595; *Coles* v. *Pack* (1869), L. R. 5 C. P. 65; *Bastow* v. *Bennett* (1812), 3 Camp. 220; *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450; *Tanner* v. *Moore* (1846), 9 Q. B. 1; *Merle* v. *Wells*, *supra*; *Woolley* v. *Jennings* (1826), 5 B. & C. 165; *Simpson* v. *Manley* (1831), 2 Cr. & J. 12; *Browning* v. *Baldwin* (1879), 40 L. T. 248; *Laurie* v. *Scholefield*, *supra*; *Williams* v. *Rawlinson*, *supra*; *Martin* v. *Wright* (1845), 6 Q. B. 917; *Allan* v. *Kenning* (1833), 9 Bing. 618; *Nottingham Hide Co.* v. *Bottrill* (1873), L. R. 8 C. P. 694; *Mayer* v. *Isaac*, *supra*; *Dry* v. *Davy* (1839), 10 Ad. & El. 30; *Hitchcock* v. *Humfrey*, *supra*; *Hargreave* v. *Smee* (1829), 6 Bing. 244; *Weston* v. *Empire Assurance Corporation* (1868), 19 L. T. 305. A promissory note, being a promise to pay "on demand," is, unlike a bill of exchange, a continuing security until payment has been made and the surety released

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929. Continuing guarantees, given for the fidelity of a person in some office or employment, often give rise to difficult questions as to the length, in point of time, of the surety's liability (*h*).

Fidelity guarantees are continuing guarantees.

(*Bellingham & Co., Ltd.* v. *Hurley* (1907), 52 Sol. Jo. 131). For examples of "specific" or "non-continuing" guarantees, see *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18; *Nicholson* v. *Paget* (1832), 1 Cr. & M. 48; *Tayleur* v. *Wildin* (1868), L. R. 3 Exch. 303; *Kay* v. *Groves* (1829), 6 Bing. 276; *Bovill* v. *Turner* (1815), 2 Chit. 205; *Melville* v. *Hayden* (1820), 3 B. & Ald. 593; *Walker* v. *Hardman* (1837), 4 Cl. & Fin. 258, H. L.; *Re Medewe's Trust* (1859), 26 Beav. 588; *Atwood* v. *Crowdie* (1816), 1 Stark. 483; *Wood* v. *Priestner* (1867), L. R. 2 Exch. 66, 282, Ex. Ch.

(*h*) Where a fidelity bond is given as part of the consideration for the appointment of the principal debtor to an office or employment, it should, in the interest of the surety, expressly stipulate that the bond shall be determinable by notice or by the surety's death (*Re Crace, Balfour* v. *Crace*, [1902] 1 Ch. 733; *Gordon* v. *Calvert* (1828), 2 Sim. 253). It may be as well to mention in this place that the Government Offices Security Act, 1810 (50 Geo. 3, c. 85), by s. 1, obliges persons appointed to offices of public trust in England, and who are concerned with public money, to give security, within certain prescribed periods, for the due performance of their trust; while the Government Officers (Security) Act, 1875 (38 & 39 Vict. c. 64), s. 2, empowers the Treasury from time to time, by warrant, to vary the security required from a person holding any office or employment in the public service, and provides that "where the guarantee of any company has, before the passing of this Act, been accepted as security for any person holding any office or employment in the public service, such guarantee shall continue to be received as security for such person, subject to any power which the head officer of the department in which such person serves may have to require some other security" (*ibid.*, s. 3). Owing to the delay in getting guarantee bonds passed in the head office of an English company in London it frequently happens that where the bond of an English guarantee company is accepted in Scotland, the time prescribed for finding security expires before such bond can be obtained. Accordingly, in *Cuthbertson and Others* (1905), (O. H.) 13 Scots Law Times, 205, and *Macdougall and Others* (1905), (O. H.) 13 Scots Law Times, 206, the Lord Ordinary directed a bond of a Scottish guarantee company to be substituted for that of an English company. In this connection it is to be noticed that it has recently been held that the giving of a bond of suretyship for a receiver appointed in a debenture-holders' action is not *ultra vires* of the Railway Passengers Assurance Company, which by Act of Parliament (Railway Passengers Assurance Act, 1897 (60 & 61 Vict. c. xiv.)) is permitted to carry on, besides other business, "the insurance of compensation or indemnity in respect of loss or damage occasioned to any person or persons by any act or default of any other person or persons" (*Re Spiritine, Ltd., Owen* v. *Spiritine, Ltd.* (1902), 18 T. L. R. 679, C. A.). In special circumstances, sureties to an administration bond may be dispensed with and administration granted on the administrator's personal bond (*In the Goods of Rushforth* (1908), 25 T. L. R. 128). It may be as well to mention here that it is usual to have sureties for the performance of covenants contained in deeds of apprenticeship. Such sureties have no principal debtor, and their engagements are not, therefore, within the Statute of Frauds (29 Car. 2, c. 4), s. 4; see p. 458, *ante*. For, save in the City of London, where, by custom of the place, a master can sue his apprentice for breach of covenant (*Horn* v. *Chandler* (1670), 1 Mod. Rep. 271), such an action will not lie against an infant apprentice (*Gylbert* v. *Fletcher* (1630), Cro. Car. 179; *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, *per* FRY, L.J., at p. 437), though, apparently, he can be sued upon a covenant by deed for the price of necessaries, but the case must then be treated as if there had been no deed (*Walter* v. *Everard*, [1891] 2 Q. B. 369, C. A., *per* Lord ESHER, M.R., at pp. 372, 373). The surety for the performance of covenants in an apprenticeship deed remains liable, even after the apprentice has avoided the deed on coming of age (*Cuming* v. *Hill* (1819), 3 B. & Ald. 59). Disputes between masters and apprentices may be heard and determined by a court of summary jurisdiction (Employers and

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After re-appointment of the principal.

Where the office is for a specific time only, the liability of the surety must be confined to such specific time (*i*), unless the fidelity bond contains apt words extending his liability to subsequent re-appointments (*k*). It sometimes happens that, while the condition of the bond is general and indefinite as to the time during which the surety is to remain liable for the employee, the recital shows that the appointment of the latter to the office in question is for a specific time only. In such cases the condition is restrained by the recital and the surety's liability restricted to such specific time (*l*), whether the recital specify, in so many words, the length of the term of office (*m*), or merely state that the appointment was made under some Act of Parliament whereby the office is expressly limited to a specified period of time (*n*). Even where the surety may have consented to the reappointment of the employee, he is apparently only liable for defaults committed during the period for which the original appointment was made (*o*).

Where there is nothing to control the general and indefinite language of the condition of a fidelity bond, and it does not appear from any recital therein, nor in any other way, that the office or employment, for the due discharge of which another is surety, is limited in duration, the liability of the surety is co-extensive in duration with that of the employee (*p*).

Workmen Act, 1875 (38 & 39 Vict. c. 90), ss. 5, 6), which may order the surety to pay damages for any breach of the contract of apprenticeship to an amount not exceeding the limit (if any) to which he is liable under the instrument of apprenticeship (*ibid.*, s. 7; and see generally as to the contract of apprenticeship, titles INFANTS AND CHILDREN; MASTER AND SERVANT).

(*i*) See *Kitson* v. *Julian* (1855), 4 E. & B. 854; *Bamford* v. *Iles* (1849), 3 Exch. 380; *Hassell* v. *Long* (1814), 2 M. & S. 363; *St. Saviour's, Southwark* (*Wardens*) v. *Bostock* (1806), 2 Bos. & P. (N. R.) 175.

(*k*) *Peppin* v. *Cooper* (1819), 2 B. & Ald. 431; *Augero* v. *Keen* (1836), 1 M. & W. 390, where the condition of the bond made the surety liable for the employee's fidelity to statutory trustees from time to time, and at all times thereafter, during such time as the employee should continue in his office, whether by virtue of his said appointment or of his said reappointment thereto, or of any such retainer or employment, by or under the authority of the trustees or their successors. It would be difficult to find words more clear than these to show that the parties intended to provide for the continuance of the employee in office in order to save expense, so that as long as he continued in office under his original appointment only one bond should be required (*Augero* v. *Keen, supra, per* Lord ABINGER, C.B., at p. 395; and see also *Dartmouth Corporation* v. *Silly* (1857), 7 E. & B. 97; *Oswald* v. *Berwick-upon-Tweed Corporation* (1856), 5 H. L. Cas. 856; *Portsea Island Union Guardians* v. *Whillier* (1860), 6 Jur. (N. S.) 887).

(*l*) *Arlington* (*Lord*) v. *Merricke* (1672), 2 Wms. Saund. 402 a; *Liverpool Water Works Co.* v. *Atkinson* (1805), 6 East, 507; and see p. 475, *ante*.

(*m*) *Ibid.*

(*n*) *Peppin* v. *Cooper, supra.* Where the appointment is recited to have been made under a statute, which does not limit the length of the appointment to a particular period of time, but is indefinite in its language on this subject, the obligation of the surety cannot be so narrowed (*Curling* v. *Chalklen* (1815), 3 M. & S. 502).

(*o*) *Kitson* v. *Julian, supra;* and see *Williams* v. *Jones and A.-G.* (1729), Bunb. 275.

(*p*) See *Birmingham Corporation* v. *Wright* (1851), 16 Q. B. 623; *Sansom* v. *Bell* (1809), 2 Camp. 39; *Curling* v. *Chalklen, supra.* A bond conditioned for the due accounting by a collector of church and poor rates to the obligees

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Principal's appointment to fresh office.

930. Where the principal, for whom another is surety, is subsequently appointed to an office, and this operates as a cesser of the original appointment, the surety, unless the guarantee provides to the contrary, ceases to be liable, even though the second appointment does not involve additional nor different duties from those originally imposed (*q*). Moreover, the surety is also freed from further liability, under his fidelity guarantee, where the old and new appointments are so incompatible that acceptance of the new appointment necessarily vacates the old one (*r*). However, the mere acceptance by the principal of an incompatible office will not have this effect in a case where he cannot divest himself of his original office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, such authority not being privy or consenting to the second appointment (*s*). So where the second appointment does not operate as an implied amotion from the old office, because the authority making the second appointment cannot remove the principal from his original office, or accept a surrender thereof, the surety continues liable (*t*).

Where the new office or employment is not incompatible with the original one and does not operate as a cesser thereof, the surety is not discharged (*a*).

Change in tenure of appointment.

931. The conversion of the office filled by the principal from "an annual office" into one "during pleasure" will determine the surety's liability (*b*), unless the guarantee provides to the contrary (*c*). On the other hand, where one of the terms of a contract of service makes it determinable by one month's notice on either side, and afterwards, without the surety's knowledge, it is agreed that the service shall be terminable by three months' notice, the surety is not discharged where he has not chosen to make such term part of his own contract (*d*).

"and their successors," who were churchwardens and overseers, was held not to extend beyond the year of office of such obligees, as the collector's appointment was only for such period (*Leadley* v. *Evans* (1824), 2 Bing. 32), though, apparently, had such collector's appointment been for a longer period than that of the obligees, the sureties would have remained liable to "the successors" of the original obligees (*M'Gahey* v. *Alston* (1836), 1 M. & W. 386). The words "and their successors" in such a bond might conceivably be inserted to meet the death of the original obligees during the collector's year of office.

(*q*) *Malling Union* v. *Graham* (1870), L. R. 5 C. P. 201.

(*r*) *Frank* v. *Edwards* (1852), 8 Exch. 214; *Anderson* v. *Thornton* (1842), 3 Q. B. 271; and see *R.* v. *Pateman* (1788), 2 Term Rep. 777; *Milward* v. *Thatcher* (1787), 2 Term Rep. 81. As to incompatible offices, see, generally, title CORPORATIONS, Vol. VIII., p. 332.

(*s*) *R.* v. *Patteson* (1832), 4 B. & Ad. 9.

(*t*) *Worth* v. *Newton* (1854), 10 Exch. 247.

(*a*) See *Frank* v. *Edwards*, *supra*; *Anderson* v. *Thornton*, *supra*. Thus, where a person becomes surety for a clerk in a bank, who is afterwards appointed manager of the bank, the surety will not be relieved from liability, unless it is proved that when the principal became manager he ceased to be a clerk (*Anderson* v. *Thornton*, *supra*).

(*b*) *Cambridge Corporation* v. *Dennis* (1858), E. B. & E. 660.

(*c*) *Oswald* v. *Berwick-upon-Tweed Corporation* (1856), 5 H. L. Cas. 856; *Dartmouth Corporation* v. *Silly* (1857), 7 E. & B. 97.

(*d*) *Sanderson* v. *Aston* (1873), L. R 8 Exch. 73, where the surety was

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932. Any material alteration in the duties of the principal's office, whether effected by Act of Parliament (*e*) or otherwise, will discharge the surety (*f*). Where, however, the duties are not materially altered, but lessened, the surety's liability continues, even though the salary be reduced as well (*g*). Moreover, where the surety has guaranteed the fidelity of a person holding two offices, one of which is subsequently altered while the other is not, his guarantee still applies to the latter (*h*), though, in general, any alteration in the contract between the creditor and the principal debtor to which the surety has not consented will discharge the latter, unless it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot but be beneficial to the surety (*i*).

Material alteration in principal's duties.

933. The subdivision of the original office in respect of which a fidelity guarantee has been given, when coupled with an alteration in the amount and character of the remuneration, will terminate the surety's liability (*k*).

Subdivision of principal's office.

934. Whether a reduction or increase of salary of the principal debtor, or alteration in the mode of payment thereof, will relieve the surety from liability greatly depends on the language of the guarantee (*l*). If, however, the amount of the salary of the principal is to be treated as an essential ingredient in the contract, care must be taken by the surety to have a stipulation on the subject introduced into the guarantee or condition of the fidelity bond, as otherwise the alteration will not affect his liability (*m*).

Alteration of principal's salary.

Where the appointment contemplated by the surety is not made at all, but another at a higher salary, the surety will not be bound, as

Contemplated appointment not made.

ultimately discharged from liability because the master continued to employ the servant with full knowledge of his having failed to account and pay over moneys, and without informing the surety thereof; see also *Nicolsons* v. *Burt* (1882), 10 R. (Ct. of Sess.) 121.

(*e*) *Pybus* v. *Gibb* (1856), 6 E. & B. 902; *Bartlett* v. *A.-G.* (1709), Park. 277; *Malling Union* v. *Graham* (1876), L. R. 5 C. P. 201.

(*f*) *Bonar* v. *Macdonald* (1850), 3 H. L. Cas. 226; *Wembley Urban District Council* v. *Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd.* (1901), 17 T. L. R. 516.

(*g*) *Frank* v. *Edwards* (1852), 8 Exch. 214.

(*h*) *Skillett* v. *Fletcher* (1867), L. R. 2 C. P. 469, Ex. Ch.; *Harrison* v. *Seymour* (1866), L. R. 1 C. P. 518; *Croydon Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46, C. A.; *Brown & Co.* v. *Brown, Brown* v. *Brown & Co.* (1877), 36 L. T. 272, C. A.

(*i*) *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A., *per* COTTON, L.J., at p. 505; and see *R.* v. *Herron and Montgomery*, [1903] 2 I. R. 474. Thus, a surety in a bond, conditioned for the good conduct of a banker's clerk, is not liable for misbehaviour consequent upon his being allowed to become a customer and to keep an account with the bank (*Stoveld* v. *Upton* (1836), 6 L. J. (C. P.) 126).

(*k*) *R.* v. *Herron and Montgomery, supra.* But where a person is appointed collector of poor rates for a whole parish, his subsequent transfer from one district of the same parish to another district thereof will not *per se* discharge his surety (*Portsea Island Union Guardians* v. *Whillier* (1860), 6 Jur. (N. S.) 887).

(*l*) As to interpretation, see p. 474, *ante*.

(*m*) *Frank* v. *Edwards, supra, per* PARKE, B., at pp. 220, 221. The substitution of payment by commission for remuneration at a fixed salary as originally arranged will, however, operate as a discharge (*North Western Rail. Co.* v. *Whinray* (1854), 10 Exch. 77).

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his liability in such a case never even attaches (*n*). Moreover, where the original appointment of the principal debtor is for an indefinite time, and the surety has agreed to be liable so long as the former continues in office, the subsequent reappointment of the principal debtor at a different salary will revoke the original appointment and terminate the surety's liability (*o*).

Change of parties.

935. In the absence of an agreement to the contrary, a continuing guarantee is revoked, as to future transactions thereunder, by any change in the constitution of the persons to or for whom the guarantee was given (*p*).

Increase in number of persons to whom the guarantee is given.

936. Whether the surety's liability will continue after an increase has taken place in the number of the persons to whom the guarantee was originally given is more or less a question of intention, ascertainable by reference to the terms of the guarantee (*q*) and to its subject-matter (*a*). This intention should, however, be clearly expressed, if effect is to be given to it (*b*), and the mere use of language indicating that the guarantee is given to certain

(*n*) *Holland* v. *Lea* (1854), 9 Exch. 430.

(*o*) *Bamford* v. *Iles* (1849), 3 Exch. 380, *per* POLLOCK, C.B., at p. 386; and see *Toames Co-operative Agricultural and Dairy Society* v. *Foley*, [1910] 2 I. R. 277, C. A. Where the principal debtor (a clerk to poor law guardians) obtained an increase of salary from his employers (the board of guardians) by fraud, not only was his surety not thereby discharged, but, on the contrary, the loss occasioned to the board of guardians by such fraud was held to be recoverable from the surety under a policy for the due and faithful discharge of his duties by the principal debtor (see *Bramley Union Guardians* v. *Guarantee Society* (1900), 64 J. P. 308, C. A.).

(*p*) See Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18. This enactment, which does not apply to corporations (see title BANKERS AND BANKING, Vol. I., p. 642), is very similar in terms to the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 4, which it replaces, though in some respects the language of the later enactment appears to be stronger than that of the older one (see title BANKERS AND BANKING, Vol. I., p. 642, note (*k*)). It has not introduced any material alteration in the common law (see Lindley's Partnership Act, 1890, p. 47; Lindley on Partnership, 7th ed., p. 137), so that the decisions given prior thereto and to the earlier enactment are still applicable (*Backhouse* v. *Hall* (1865), 6 B. & S. 507, *per* BLACKBURN, J., at p. 520). These decisions, which are dealt with in the text, are (many of them, at least) commented upon and collected 3 Doug. (K. B.) p. 326, n. (d); see also, as to the effect of changes in the members of a firm on guarantees in general, *Smith* v. *Patrick*, [1901] A. C. 282; *Ex parte Kensington* (1813), 2 Ves. & B. 79, *per* Lord ELDON, L.C., at p. 83; *Eyton* v. *Knight* (1837), 2 Jur. 8; *Bank of Scotland* v. *Christie* (1840), 8 Cl. & Fin. 214, H. L. As to partnership and the liabilities of partners generally, see title PARTNERSHIP.

(*q*) *Backhouse* v. *Hall*, *supra*, *per* BLACKBURN, J., at pp. 519, 520; and see *Pease* v. *Hirst* (1829), 10 B. & C. 122; *Ex parte Watson* (1815), 19 Ves. 459; *Pariente* v. *Lubbock* (1856), 8 De G. M. & G. 5, C. A.; *Eyton* v. *Knight*, *supra*.

(*a*) *Barclay* v. *Lucas* (1783), 1 Term Rep. 291, n., *per* Lord MANSFIELD, at p. 293. This *dictum* still holds good, though the actual decision given can no longer be supported (see *Dance* v. *Girdler* (1804), 1 Bos. & P. (N. R.) 34), having regard to the cases cited note (*c*), p. 499, *post*.

(*b*) *Strange* v. *Lee* (1803), 3 East, 484, *per* LAWRENCE, J., at p. 491; *Backhouse* v. *Hall*, *supra*, *per* BLACKBURN, J., at pp. 519, 520; and see *Metcalf* v. *Bruin* (1810), 12 East, 400; *Kipling* v. *Turner* (1821), 5 B. & Ald. 261; *Ex parte Kensington*, *supra*.

individuals in their capacity as partners in a "firm" or "house" will not suffice for the purpose (*c*).

A guarantee given to one person for the fidelity of another ceases to operate after the former has taken a third party into partnership with him (*d*). So, securities given to a banking firm for a current balance do not cover transactions subsequent to the admission of a new partner (*e*).

Decrease in number of persons to whom the guarantee is given.

937. The death of a member of the firm to whom a guarantee is given will generally discharge the surety (*f*), even though the guarantee be given for a fixed time, which has not expired when the death occurs (*g*), unless a contrary intention be indicated by the guarantee (*h*). A bond conditioned for faithful service of the principal to the obligee and his executors does not make the surety liable for defaults committed by the principal, after the obligee's death, when in the service of the executors who continue the business and retain him in their employment (*i*).

By retirement from firm.

The retirement of a partner from the firm to whom a guarantee has been given will determine the surety's liability as to future transactions thereunder (*k*), in the absence of any expression of intention to the contrary contained in the guarantee (*l*).

Change of status.

938. The subsequent incorporation of a voluntary society, or private partnership firm, to whom a guarantee is given will terminate the surety's liability as to future transactions thereunder (*m*). But a mere statutory change in the name of a company

(*c*) *Weston* v. *Barton* (1812), 4 Taunt. 673; and see *Pemberton* v. *Oakes* (1827), 4 Russ. 154; *Hollond* v. *Teed* (1848), 7 Hare, 50; *Spiers* v. *Houston* (1829), 4 Bli. (N. S.) 515, H. L.; *Wright* v. *Russel* (1774), 3 Wils. 530. A different view from that expressed in these cases was formerly held (see *Weston* v. *Barton*, *supra*, *per* Lord MANSFIELD, at p. 681; *Backhouse* v. *Hall* (1865), 6 B. & S. 507, *per* BLACKBURN, J., at p. 519; *Barclay* v. *Lucas* (1783), 1 Term Rep. 291, n.). This last-named case is apparently overruled (see *Dance* v. *Girdler* (1804), 1 Bos. & P. (N. R.) 34; *Strange* v. *Lee* (1803), 3 East, 484; *Weston* v. *Barton*, *supra*).

(*d*) *Wright* v. *Russel*, *supra*.

(*e*) *Eyton* v. *Knight* (1837), 2 Jur. 8; and see *Bank of Scotland* v. *Christie* (1840), 8 Cl. & Fin. 214, H. L.

(*f*) See Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18; *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K. B. 59; *Strange* v. *Lee*, *supra*; *Weston* v. *Barton*, *supra*; *Pemberton* v. *Oakes*, *supra*; *Chapman* v. *Beckinton* (1842), 3 Q. B. 703; *Bank of Scotland* v. *Christie*, *supra*. As to the effect of change by death etc. in a firm, to which an apprentice is bound, on the liability of a surety for the latter, see *Lloyd* v. *Blackburn* (1842), 9 M. & W. 363; *R.* v. *St. Martin's, Exeter* (*Inhabitants*) (1835), 2 Ad. & El. 655.

(*g*) *Hollond* v. *Teed*, *supra*; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18.

(*h*) See *Metcalf* v. *Bruin* (1810), 12 East, 400; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18.

(*i*) *Barker* v. *Parker* (1786), 1 Term Rep. 287.

(*k*) *Myers* v. *Edge* (1797), 7 Term Rep. 254; *Dry* v. *Davy* (1839), 10 Ad. & El. 30; *Solvency Mutual Guarantee Co.* v. *Freeman* (1861), 7 H. & N. 17; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18.

(*l*) *Pease* v. *Hirst* (1829), 10 B. & C. 122; *Re Carlill*, *Ex parte Marsh* (1815), 2 Rose, 239, 242; *Re Ireland and Harrison*, *Ex parte Loyd* (1838), 3 Deac. 305.

(*m*) *Dance* v. *Girdler*, *supra*, where the guarantee was given to a voluntary society "and its successors."

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already registered under an Act of Parliament, whereby the rights of the company and the obligations of the surety are in no way varied, will not release the surety from liability where the rights and remedies of the company are expressly preserved by the statute effecting such change (*n*).

Effect of amalgamation of two companies.

939. Save where an amalgamation or consolidation of two companies is effected by statute, expressly or impliedly preserving rights against a surety (*o*), a guarantee given to either is generally, by such amalgamation or consolidation, invalidated as to future transactions (*p*). For an amalgamation of two companies, even though they be banking companies, need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either (*q*).

Estoppel from denial of liability.

940. Sureties to a company may by conduct become estopped from denying their liability after the reconstruction of such company (*r*).

Alteration in position of principal.

941. A surety for the fidelity of an agent is not liable after the agency has been intrusted by the employers to a new firm comprising such agent (*s*), even where the surety had knowledge, before he executed the fidelity bond, that the agent intended to enter into the partnership after the execution of the fidelity bond (*t*).

(*n*) *Groux's Improved Soap Co., Ltd.* v. *Cooper* (1860), 8 C. B. (N. S.) 800; *Wilson* v. *Craven* (1841), 8 M. & W. 584; and see *Capital and Counties Bank* v. *Bank of England* (1889), 61 L. T. 516; *Prescott, Dimsdale, Cave, Tugwell & Co.* v. *Bank of England*, [1894] 1 Q. B. 351, C. A. These two last-cited cases are not guarantee cases, but cases decided under the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 23, 24. They are, however, *in pari materiâ*, and are therefore referred to.

(*o*) *London, Brighton and South Coast Rail. Co.* v. *Goodwin* (1849), 3 Exch. 320, where the consolidation did not affect the responsibility of the principal for whose fidelity the surety had agreed to become liable; see also *Eastern Union Rail. Co.* v. *Cochrane* (1853), 9 Exch. 197. Where an amalgamation takes place of the firm to whom a guarantee was given with some other body, rendering such guarantee inoperative as to future transactions thereunder, the new amalgamated body can only sue in its own name, or in that of its public officer, in respect of past transactions under the guarantee when a change of name only is effected by the amalgamation (*Wilson* v. *Craven* (1841), 8 M. & W. 584). If, however, the amalgamation has a greater effect than this, the liability of the surety under the guarantee, in respect of past transactions, must, apparently, be enforced by the persons to whom the guarantee was originally given (*Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A.; *Moller* v. *Lambert* (1810), 2 Camp. 548).

(*p*) See title BANKERS AND BANKING, Vol. I., p. 642; Lindley on Partnership, 6th ed., p. 127; Lindley on Companies, 6th ed., Vol. I., p. 369, n. (s), Vol. II., p. 1211, n. (d). Reasoning by analogy to cases decided under the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 23, 24, it would seem that where one corporate banking company absorbs another the former can sue on guarantees previously received by it (*Capital and Counties Bank* v. *Bank of England, supra*), but not on those given to the bank absorbed (*Prescott, Dimsdale, Cave, Tugwell & Co.* v. *Bank of England, supra*).

(*q*) *Prescott, Dimsdale, Cave, Tugwell & Co.* v. *Bank of England, supra, per* A. L. SMITH, L.J., at pp. 364, 365.

(*r*) *Ashby* v. *Day* (1885), 33 W. R. 631; see title ESTOPPEL, Vol. XIII., p. 397, note (*k*).

(*s*) *Bellairs* v. *Ebsworth* (1811), 3 Camp. 53.

(*t*) *Montefiore* v. *Lloyd* (1863), 12 W. R. 83; *London Assurance Co.* v. *Bold*

Where the surrounding circumstances indicate an intention on the part of the surety to remain liable after the principal has taken another into partnership with him, the guarantee will continue applicable to future transactions (*a*).

By death.

942. A bond given by a surety for repayment of such sums as may be advanced to meet bills drawn by two persons in partnership or either of them, does not extend to bills drawn by one of such persons after the death of the other (*b*).

Alteration in membership of firm guaranteed.

Unless a contrary intention is indicated, the retirement of a partner from the firm, for whose fidelity the surety has made himself liable, will determine the surety's future liability (*c*), even where the guarantee contemplates its continuance after the death of such partner (*d*).

Change of status of principal debtors.

943. Where a surety would be discharged from liability by the subsequent incorporation of persons to whom a guarantee is given, or in the case of a company being the guaranteed creditor by its consolidation or amalgamation, he will also be discharged by similar changes taking place after the date of the guarantee in the constitution of the principal debtors for whom such guarantee was given (*e*).

SUB-SECT. 3.—*Fraud on the Creditor.*

Fraudulent surety.

944. Where a transaction takes place on the faith of a written guarantee, which, to the knowledge of the surety or his agent, is in existing circumstances worthless, the surety may in some circumstances be liable to an action for false representation (*f*).

(1844), 6 Q. B. 514; and see *Mills* v. *Alderbury Union Guardians* (1849), 3 Exch. 590, 596.

(*a*) *Leathley* v. *Spyer* (1870), L. R. 5 C. P. 595; and see *Bank of British North America* v. *Cuvillier* (1861), 4 L. T. 159, P. C.

(*b*) *Simson* v. *Cooke* (1824), 1 Bing. 452.

(*c*) *Cambridge University* v. *Baldwin* (1839), 5 M. & W. 580.

(*d*) *Ibid.*

(*e*) This view is, it is submitted, warranted by the language of the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18. See p. 498, *ante*, where the effect of changes in the constitution of the persons to whom a guarantee is given is considered; and as to the effect of changes in partnership firms generally, see title PARTNERSHIP.

(*f*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.; and see *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394. The referee of an intending lessee, who in answer to inquiries states that the intending lessee is a man of substance and respectability, well knowing the contrary to be the case, is liable for such misrepresentation (*Leddell* v. *McDougall* (1881), 29 W. R. 403, C. A.). When a banker is asked as to the standing and financial position of a customer he need not make any inquiries outside as to the solvency or otherwise of the customer, nor do anything more than answer the question put to him honestly from what he knows from the accounts and books before him (*Parsons* v. *Barclay & Co., Ltd., and Goddard* (1910), 103 L. T. 196, C. A.). Where a partnership firm fraudulently pledged goods belonging to a third person to secure a debt due from the firm to its bankers, the owner was held entitled, to the extent of the value of such goods, to the benefit of a guarantee for the payment of such partnership debt given by a member of the firm, who was innocent of the fraud perpetrated by his co-partners (*Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A.). He was also held entitled to prove, in respect of the goods wrongfully pledged, against the separate estate of such innocent partner (*ibid.*). As to the fraudulent omission of a surety to reduce a guarantee into writing, see p. 456, *ante*. As to a fraudulent

SECT. 3. Enforcement of Liability.

SECT. 3.—*Enforcement of Liability.*

Remedy.

945. The remedy (*g*) against a solvent (*h*) surety on his guarantee is by action in the High Court or in the county court, according to the sum claimed (*i*).

Procedure.

946. Where the claim is in respect of a debt or liquidated demand only, the plaintiff can proceed in the High Court by specially indorsed writ (*j*), which need not, apparently, disclose the fact that the defendant is a surety (*k*).

Unconditional leave to defend.

Where recourse is had to the remedy by specially indorsed writ, if there be no acknowledgment of liability either by the principal debtor or the surety, nor anything else to show that the defence is for purposes of delay, unconditional leave to defend will, generally, be given (*l*).

Joinder of parties in action.

947. When the interest of the creditors in a guarantee is joint, though in terms joint and several, the action must be brought in the name of all the persons to whom the guarantee is given (*m*).

An action may be maintained by the several partners of a firm, upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all (*n*), and especially if the partner to whom the guarantee was addressed did not carry on any separate business to which the guarantee could relate (*o*). On

conveyance of the surety's property, see p. 479, *ante*, and title FRAUDULENT AND VOIDABLE CONVEYANCES, pp. 77 *et seq.*, *ante*. As to misrepresentation, actual and constructive, generally, see title MISREPRESENTATION AND FRAUD.

(*g*) As regards the evidence of the principal debtor's default which the creditor must produce in court in an action against a surety on his guarantee, see p. 487, *ante*.

(*h*) For the effect of bankruptcy on a guarantee, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 204, 205.

(*i*) As to the ordinary jurisdiction of county courts, see title COUNTY COURTS, Vol. VIII., pp. 428 *et seq.*; and as to the jurisdiction in remitted actions, see *ibid.*, pp. 438 *et seq.*

(*j*) As to this method of procedure under R. S. C., Ord. 3, r. 6, see title PRACTICE AND PROCEDURE.

(*k*) See *Caldwell* v. *Wren* (1877), 12 I. L. T. 146; *Ahearn* v. *O'Donovan* (1880), 15 I. L. T. 17. As to assignment of breaches of a fidelity bond, see *Stothert* v. *Goodfellow* (1832), 1 Nev. & M. (K. B.) 202. As to assignment of breaches generally, see title BONDS, Vol. III., pp. 94, 102.

(*l*) *Lloyd's Banking Co.* v. *Ogle* (1876), 1 Ex. D. 262; R. S. C., Ord. 14, r. 6; and see *Harrison* v. *Gordon* (*Lord*) (1887), 3 T. L. R. 490; *Harrison* v. *Lascelles* (*Lord*) (1887), 3 T. L. R. 490; *Anglo-Italian Bank* v. *Wells*, *Anglo-Italian Bank* v. *Davies* (1878), 38 L. T. 197, C. A.

(*m*) *Pugh* v. *Stringfield* (1858), 3 C. B. (N. S.) 2; and see *Jones* v. *Beach* (1852), 2 De G. M. & G. 886, 888. In Scotland the meaning and effect (formerly considered doubtful) of the words "jointly and severally" are explained in *Flemings* v. *Gemmill* (1907), 45 Sc. L. R. 281. It is not a principle of equity that a joint covenant shall ever be considered as if it were joint and several (*Sumner* v. *Powell* (1816), 2 Mer. 30). Thus, a joint covenant of indemnity will not be extended beyond its legal operation, there being no ground on which to infer mistake in the nature of the instrument, and no previous equity entitling the covenantee to a several indemnity from each of the covenantors (*ibid.*).

(*n*) *Garrett* v. *Handley* (1825), 4 B. & C. 664. An action may be maintained upon a bond, expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed (*Moller* v. *Lambert* (1810), 2 Camp. 548).

(*o*) *Walton* v. *Dodson* (1827), 3 C. & P. 162.

the other hand, where a guarantee is addressed to several persons, one of whom has no interest whatever in the subject-matter guaranteed, he need not be joined as a plaintiff (*p*). Moreover, where a guarantee is given to one member of a firm personally, in consideration of his undertaking not to sue certain debtors of the firm, he can sue on the guarantee alone without joining his partners as co-plaintiffs (*q*).

Trustees etc.

948. A guarantee given to the trustees of an unincorporated company (*r*), or to an official of a court of justice, acting as trustee for a fluctuating and unknown body of suitors (*s*), or to a committee of a society of underwriters (*t*), may be sued upon by such persons for the benefit of those they represent.

By whom guarantee enforceable.

949. A guarantee, not addressed to anyone, can apparently be enforced by the party to whom, or for whose benefit, it was given (*a*).

Enforcement by stranger.

950. A person who is not a party to a guarantee or indemnity or fidelity bond of suretyship can sometimes sue thereon, as being entitled to the benefit thereof (*b*). To entitle him to sue either of the contracting parties he must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract (*c*).

(*p*) *Place* v. *Delegal* (1838), 4 Bing. (N. C.) 426; and see *Palmer* v. *Sparshott* (1842) 4 Man. & G. 137.

(*q*) *Agacio* v. *Forbes* (1861), 14 Moo. P. C. C. 160.

(*r*) *Metcalf* v. *Bruin* (1812), 12 East, 400.

(*s*) *Lamb* v. *Vice* (1840), 6 M. & W. 467.

(*t*) *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A.; and see *Leathley* v. *Spyer* (1870), L. R. 5 C. P. 595; *Moller* v. *Lambert* (1810), 2 Camp. 548. As to the effect of amalgamation of firms or companies, see p. 500, *ante*.

(*a*) *Walton* v. *Dodson* (1827), 3 C. & P. 162. It is difficult, if not impossible, to reconcile this case with those cases (see p. 467, *ante*) which decide that to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 4, the names of the contracting parties must appear in writing. Where, however, such a guarantee as that referred to in the text is accepted in writing signed by the person to whom it was delivered, the statute would then clearly be satisfied.

(*b*) See *Kenney* v. *Employers' Liability Assurance Corporation*, [1901] 1 I. R. 301, C. A.; *Lloyd's* v. *Harper*, *supra*. In *Re Stratton*, *Ex parte Salting* (1883), 25 Ch. D. 148, C. A., a third person, whose securities had been fraudulently pledged to a bank for a debt of a partnership firm, was held entitled *pro tanto* to the benefit of a guarantee for payment to the bank of the partnership debt given by a member of the firm who was innocent of the fraudulent pledge complained of. As to whether a person, not a party to a guarantee, can sue thereon in his own name, where it is intended to operate for the benefit of all parties interested in the fulfilment of certain duties the performance of which is guaranteed, see *Kenney* v. *Employers' Liability Assurance Corporation*, *supra*, at p. 322, where the suit was framed as an action by the obligee of the suretyship bond, as the legal party to the contract to recover the amount of the bond, joining as co-plaintiff the party who, upon the facts stated, was equitably and beneficially entitled as between himself and his co-plaintiff to the damages recoverable upon the breach of the bond; see also *Britannia Steamship Insurance Association, Ltd.* v. *Duff* (1909), 46 Sc. L. R. 894.

(*c*) *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, 66, 67, C. A.; *Lloyd's* v. *Harper*, *supra*; *Tomlinson* v. *Gill* (1756), Amb. 330; *Re Flavell*, *Murray* v. *Flavell* (1883), 25 Ch. D. 89, C. A.; *Drimmie* v. *Davies*, [1899] 1 I. R. 176, C. A.; *Gregory* v. *Williams* (1817), 3 Mer. 582; *Page* v. *Cox* (1852), 10 Hare, 163;

SECT. 3. **Enforcement of Liability.**

By assignee.

951. The person to whom a guarantee is given may assign the guaranteed debt and the securities for the same (*d*). Where he does so, the assignee acquires all the rights of the assignor (*e*), including the right to sue in his own name on the guarantee (*f*).

The defendants to an action on a guarantee.

952. The plaintiff may join as defendants to an action on a guarantee all or any of the persons severally or jointly and severally liable thereunder (*g*), and a bond under which the principal and the sureties are liable may be enforced against them in the same action (*h*).

Where several sureties, liable for a limited sum each.

953. The amount recoverable from each of several sureties, whose liability under the same guarantee is expressed to be for a limited sum named, depends on whether each has made himself liable for that sum, or whether that sum represents their total aggregate liability (*i*). In the former case the full amount can be recovered from each consecutively (*k*), while in the latter payment of such sum by one of them relieves the rest from further liability on the guarantee (*l*).

Set-off or counterclaim.

Liability under a guarantee may be made the subject of a set-off or counterclaim (*m*). Moreover, a debt due to a deceased partner

Tweddle v. *Atkinson* (1861), 1 B. & S. 393; *Dixon* v. *Reuter's Telegraph Co.* (1877), 2 C. P. D. 62; and see *Kenney* v. *Employers' Liability Assurance Corporation*, [1901] 1 I. R. 301, 307, C. A.; *West* v. *Houghton* (1879), 4 C. P. D. 197.

(*d*) *Wheatley* v. *Bastow* (1855), 7 De G. M. & G. 261, C. A., *per* TURNER, L.J., at pp. 279, 280; but see *Re Barrington and Burton* (1804), 2 Sch. & Lef. 112; *Re Barned's Banking Co., Ex parte Stephens* (1868), 3 Ch. App. 753.

(*e*) *Wheatley* v. *Bastow*, *supra*, *per* TURNER, L.J., at pp. 279, 280.

(*f*) *Ibid.*; and see *Re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, [1894] 2 Q. B. 256, C. A. As to assignments of debts and choses in action, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); and title CHOSES IN ACTION, Vol. IV., pp. 367 *et seq.* As to giving notice to the surety of the assignment of a guarantee, see *Wheatley* v. *Bastow*, *supra*, *per* TURNER, L.J., at p. 280.

(*g*) R. S. C., Ord. 16, r. 6. See also title PRACTICE AND PROCEDURE. A joint security will not be construed to be joint and several even though one of the parties thereto is a surety (*Jones* v. *Beach* (1852), 2 De G. M. & G. 886, 888; and see *Sumner* v. *Powell* (1816), 2 Mer. 30; *Other* v. *Iveson* (1855), 3 Drew. 177; *contra*, *Thorpe* v. *Jackson* (1837), 2 Y. & C. (EX.) 553). A surety for the price of goods sold to another, under bills of exchange drawn by the vendors of the goods on the vendees and indorsed by the latter to the vendors, who reindorsed them to the surety, was, on the bills being dishonoured at maturity, held liable for the amount of the bills to the vendors, who were not prevented from suing the surety on the ground of circuity of action (*Wilkinson* v. *Unwin* (1881), 7 Q. B. D. 636, C. A.).

(*h*) *Berwick-upon-Tweed Corporation* v. *Murray* (1856), 7 De G. M. & G. 497. In such a case costs are given against the principal debtor only and the sureties are not liable for same (*ibid.*). As to parties to actions on suretyship bonds, see also *Cockburn* v. *Thompson* (1809), 16 Ves. 321, 326; *Madox* v. *Jackson* (1746), 3 Atk. 406.

(*i*) A defendant who alleges in his defence that his guarantee was given on terms which limited his liability thereunder need not state that such terms were in writing (*Galey* v. *Taylor* (1848), 2 Car. & Kir. 551).

(*k*) *Fell* v. *Goslin* (1852), 7 Exch. 185; *Collins* v. *Prosser* (1823), 1 B. & C. 682; *Norton* v. *Powell* (1842), 4 Man. & G. 42; *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157, C. A.; *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440.

(*l*) *Collins* v. *Prosser*, *supra*, *per* HOLROYD, J., at pp. 687, 688.

(*m*) R. S. C., Ord. 19, r. 3; *Anglo-Italian Bank* v. *Wells*, *Anglo-Italian Bank* v. *Davies* (1878), 38 L. T. 197, C. A.; *Bankes* v. *Jarvis*, [1903] 1 K. B.

from a surviving partner and a third person, as surety, may have set off against it a debt due to such surviving partner from the deceased which was agreed to be applied in liquidation of the guaranteed debt (*n*).

Retainer by executor of deceased creditor.

Where the creditor has by will bequeathed a legacy to the surety, the executor of such will is entitled to retain out of the legacy the amount due from the surety to the testator under the guarantee (*o*).

Counter-securities.

The creditor is, however, not entitled to the benefit of counter-bonds or collateral securities given by the principal debtor to the surety to indemnify the latter in respect of liability under the guarantee (*p*).

Part VI.—The Surety's Rights against the Creditor.

SECT. 1.—*How such Rights are acquired.*

When surety's rights arise.

954. The rights of a surety against the creditor accrue to him from the relation created by the guarantee (*q*), and arise at the time of his becoming surety, and not merely when he discharges the obligation of the principal debtor (*r*). It is not, therefore, the law that the surety has no rights until he pays the guaranteed debt (*s*).

Rights acquired by one of several debtors.

The rights of a surety may also be acquired where two or more

549; *Jeffs* v. *Davies* (1866), L. R. 1 Q. B. 372; and see p. 526, *post*, and title SET-OFF AND COUNTERCLAIM. Formerly a mere liability under a guarantee could not have formed the subject of a set-off (*Crawford* v. *Stirling* (1796), 4 Esp. 207; *Morley* v. *Inglis* (1837), 4 Bing. (N. C.) 58), though money actually paid for another under an indemnity might have been set off as money paid to the use of the plaintiff (*Hutchinson* v. *Sydney* (1854), 10 Exch. 438). Debts payable on a contingency are provable in the winding up of companies (Companies Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 206). When one of several co-sureties is sued on his guarantee, he can enforce contribution from the rest by means of a third party notice (R. S. C., Ord. 16, rr. 48, 49 *et seq.*; and see p. 533, *post*).

(*n*) *Cheetham* v. *Crook* (1825), M'Cle. & Yo. 307.

(*o*) *Coates* v. *Coates* (1864), 33 Beav. 249; and as to an executor's right to retain a legacy to meet a debt, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 268.

(*p*) *Re Walker, Sheffield Banking Co.* v. *Clayton*, [1892] 1 Ch. 621; *Ex parte Waring, Inglis, Clarke* (1815), 19 Ves. 345; but see, *contra*, *Wright* v. *Morley*, *Morley* v. *St. Alban* (1805), 11 Ves. 12, *per* GRANT, M.R., at p. 22; *Maure* v. *Harrison* (1692), 1 Eq. Cas. Abr. 93. This last-named case has, however, been explained in *Re Walker, Sheffield Banking Co.* v. *Clayton*, *supra*. As to what happens to such securities in the event of both the principal debtor and surety becoming bankrupts, and as to the creditor's right generally in such a case, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 204 *et seq.*

(*q*) *Pooley* v. *Harradine* (1857), 7 E. & B. 431; *Hollier* v. *Eyre* (1842), 9 Cl. & Fin. 1, H. L.; *Greenough* v. *McClelland* (1860), 2 E. & E. 424; *Samuell* v. *Howarth* (1817), 3 Mer. 272, 277; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160.

(*r*) *Dixon* v. *Steel*, [1901] 2 Ch. 602; and see *Lake* v. *Brutton* (1856), 2 Jur. (N. S.) 839, C. A.; *Pledge* v. *Buss* (1860), John. 663; *South* v. *Bloxam* (1865), 2 Hem. & M. 457.

(*s*) *Dixon* v. *Steel*, *supra*, *per* COZENS-HARDY, J., at p. 607; but see *Re Howe, Ex parte Brett* (1871), 6 Ch. App. 838, *per* MELLISH, L.J., at p. 841.

SECT. 1. How such Rights are acquired.

debtors arrange *inter se* that one or more of their number shall be regarded as a surety or sureties for the rest and notify such arrangement to the creditor, whose consent thereto is, however, unnecessary (*t*). Moreover, if a creditor, with knowledge that another is intending to become a surety, accepts the instrument under which the surety's liability arises, the rights of a surety against him are thereby created (*u*). Where, however, two persons give a joint promissory note for the debt of one, it is necessary, in order to give the other the rights of a surety against the creditor, to show that he was only a surety and that the creditor knew him to be so and accepted him as such (*a*).

SECT. 2.—*Rights before Demand of Payment under the Guarantee has been made.*

Right to compel the creditor to sue for and collect the guaranteed debt.

955. The surety may, after the guaranteed debt has become due, and before he has been asked to pay it, require the creditor to call upon the principal debtor to pay off the debt (*b*). The creditor is, however, not bound to sue the principal debtor before suing the surety who, moreover, even where he deposits the amount of the guaranteed debt, cannot compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay, and expense he thereby incurs (*c*), and, apparently, satisfies him that the principal debtor is solvent (*d*).

Right to sue the principal debtor.

956. The surety may at any time apply to the creditor and pay him off, and then (on giving a proper indemnity for costs) may sue

(*t*) *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586, overruling *Swire* v. *Redman* (1876), 1 Q. B. D. 536, and following *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207, H. L.; *Oakford* v. *European and American Steam Shipping Co.* (1863), 1 Hem. & M. 182, 190; *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L. 348.

(*u*) *Wythes* v. *Labouchere* (1859), 5 Jur. (N. S.) 499, 500; *White* v. *Corbett* (1859), 1 E. & E. 692, Ex. Ch.; *Hollier* v. *Eyre* (1842), 9 Cl. & Fin. 1, H. L. Before the introduction of equitable pleas by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 83—86, parol evidence was inadmissible at law to prove that one of several persons, jointly and severally bound, was, in fact, only a surety and entitled to be so treated by the creditor (see *Lewis* v. *Jones* (1825), 4 B. & C. 506), while in equity such evidence was always admitted in proof of the fact (*Craythorne* v. *Swinburne* (1807), 14 Ves. 160, *per* Lord ELDON, L.C., at pp. 170, 171; and see *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187).

(*a*) *Strong* v. *Foster* (1855), 17 C. B. 201; *Pooley* v. *Harradine* (1857), 7 E. & B. 431. As to the case of joint obligors, see pp. 568, 569, *post*, and *Ashbee* v. *Pidduck* (1836), 1 M. & W. 564, cited in note (*p*), p. 569, *post*.

(*b*) *Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch. 32, C. A., *per* A. L. SMITH, L.J., at p. 75; affirmed, [1894] A. C. 586; *Ranelaugh* (*Earl*) v. *Hayes* (1683), 1 Vern. 189, *per* Sir F. NORTH, Lord Keeper (afterwards Lord GUILDFORD), at p. 190; *Rees* v. *Berrington* (1795), 2 Ves. 540, *per* Lord LOUGHBOROUGH, L.C., at p. 542; *Wright* v. *Simpson* (1802), 6 Ves. 714, *per* Lord ELDON, L.C., at p. 734; *Bank of Ireland* v. *Beresford* (1818), 6 Dow, 233, H. L., *per* Lord ELDON, L.C., at p. 238; *Nisbet* v. *Smith* (1789), 2 Bro. C. C. 579, *per* Lord THURLOW, L.C., at p. 582; *Lee* v. *Rook* (1730), Mos. 318. The existence of this right has been questioned (*Ewart* v. *Latta* (1865), 4 Macq. 983, H. L., *per* Lord WESTBURY, L.C., at p. 989; *Jackson* v. *Digby* (1854), 2 W. R. 540; and see *Lloyd* v. *Dimmack* (1877), 7 Ch. D. 398, 401; Story, s. 639.

(*c*) *Wright* v. *Simpson*, *supra*, *per* Lord ELDON, L.C., at p. 734; and see Story, ss. 327, 849.

(*d*) See *Wheeler* v. *Benedict* (1885), 43 New York Supreme Court Reports, 478.

the principal debtor in the creditor's name (*e*), or, apparently, in his own name, should he obtain an assignment of the guaranteed debt (*f*). This right is available where the creditor has a right to sue the principal debtor and refuses to exercise it (*g*). There does not, however, seem to be any instance in which a surety has ever, in practice, exercised this right, and certainly the cases in which a surety makes use of it must be very rare (*h*).

Fidelity guarantees.

957. A surety for the good behaviour of another in an employment may, if the employee be guilty of misconduct rendering him liable to dismissal, insist on the employer dismissing him (*i*). On the employer's failure to do so the surety will be discharged, where the employer himself possesses the power of dismissal (*k*), but not where such power is vested in other persons who refuse to exercise it when requested to do so by the employer (*l*). The surety should, for his own protection, where an employee for whom he is answerable has been guilty of embezzlement or other misconduct justifying dismissal, insist on having the guarantee or fidelity bond given up to him (*m*). Otherwise he may be taken to have consented to remain liable, notwithstanding such misconduct (*n*).

Misconduct of employee.

Notice to surety.

An employer is not, apparently, bound to give notice to the surety of the employee's misconduct (*o*). He must not, however, actively conceal it (*p*), and it is certainly prudent to give such notice to the surety as soon as possible, for otherwise the employer runs the risk of possibly discharging the surety (*q*).

Equitable defences.

958. A surety may, in any action that may be brought against him by the creditor on the guarantee, set up a defence of discharge from liability on equitable grounds (*r*).

Cancellation.

A guarantee may be cancelled and set aside on equitable grounds (*s*) on application made to the Chancery Division of the High Court (*t*),

(*e*) *Swire* v. *Redman* (1876), 1 Q. B. D. 536, 541.

(*f*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); and title CHOSES IN ACTION, Vol. IV., p. 373.

(*g*) *Padwick* v. *Stanley* (1852), 9 Hare, 627.

(*h*) *Swire* v. *Redman*, *supra*.

(*i*) *Sanderson* v. *Aston* (1873), L. R. 8 Exch. 73; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666; *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450, *per* MALINS, V.-C., at p. 458; *Smith* v. *Bank of Scotland* (1812), 1 Dow, 272, H. L.; but see *Byrne* v. *Muzio* (1881), 8 L. R. Ir. 396.

(*k*) *Ibid.*

(*l*) *Caxton and Arrington Union* v. *Dew* (1899), 68 L. J. (Q. B.) 380.

(*m*) *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288.

(*n*) *Ibid.*

(*o*) *Peel* v. *Tatlock* (1799), 1 Bos. & P. 419.

(*p*) *Ibid.*

(*q*) See *Snaddon* v. *London, Edinburgh, and Glasgow Assurance Co.* (1902), 5 F. (Ct. of Sess.) 182.

(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2), (5). Formerly an injunction for the purpose was obtainable (*Hawkshaw* v. *Parkins* (1818), 2 Swan. 539, 544; *Samuell* v. *Howarth* (1817), 3 Mer. 272; *Moore* v. *Bowmaker* (1815), 6 Taunt. 379; *Small* v. *Currie* (1853), 5 De G. M. & G. 141, C. A.; *Allan* v. *Inman* (1843), 7 Jur. 433).

(*s*) *Blest* v. *Brown* (1862), 3 Giff. 450; and see *Burgess* v. *Eve*, *supra*; *Allan* v. *Houlden* (1843), 6 Beav. 148.

(*t*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3).

SECT. 2. Rights before Demand of Payment etc.

while any division of the High Court may give effect to an equitable defence alleging grounds for the cancellation of a guarantee (*a*).

Parties to action for cancellation.

959. Any one of several sureties may, where each is only liable for a distinct part of the same debt, and when, consequently, there is no right of contribution *inter se*, bring an action to set aside a guarantee for fraud without making his co-sureties parties thereto (*b*). In other cases, where it is desired to have a guarantee set aside and cancelled, all co-sureties should be joined (*c*) and the principal debtor should also be made a party to the proceedings instituted (*d*).

SECT. 3.—*Rights on Payment being demanded.*

Right to set-off and counter-claim.

960. The surety, on being sued by the creditor for payment of the debt guaranteed, may avail himself of any set-off or counter-claim which the principal debtor possesses against the creditor (*e*), and any division of the High Court can give effect to it or to any equitable defence raised (*f*). Whenever the set-off or counter-claim relied on does not operate directly to reduce the debt guaranteed, the principal debtor should be made a party, so as to bind him and prevent him afterwards claiming payment from the creditor (*g*).

A surety is not, however, bound to avail himself of a set-off, but may defend on other grounds and afterwards obtain relief in other proceedings (*h*), as by a cross-action (*i*).

Right to compel a creditor to resort first to a fund not available to the surety.

961. The surety, when payment is demanded of him by the creditor, may also compel the latter, if he has a claim upon two

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2); and see *Batten, Carne and Carne Banking Co., Ltd.* v. *Reed* (1902), *Times*, 14th February; and title EQUITY, Vol. XIII., pp. 52, 62.

(*b*) *Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424; and see *Coope* v. *Twynam* (1823), Turn. & R. 426.

(*c*) *Allan* v. *Houlden* (1843), 6 Beav. 148.

(*d*) *Ibid.*

(*e*) *Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372; *Murphy* v. *Glass* (1869), L. R. 2 P. C. 408; compare *Thornton* v. *Maynard* (1875), L. R. 10 C. P. 695. One of two joint and several obligors sued on a bond cannot set off against the creditor's claim under the bond a debt due from the creditor to the other obligor and assigned by the latter to both obligors (*Bowyear* v. *Pawson* (1881), 6 Q. B. D. 540; see also *Newton* v. *Lee* (1893), 139 New York Reports, 332; *Gillespie* v. *Torrance* (1862), 25 New York Reports, 306; *Alcoy and Gandia Rail. and Harbour Co.* v. *Greenhill* (1897), 76 L. T. 542). As to set-off and counterclaim, see, generally, title SET-OFF AND COUNTERCLAIM.

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2); and see *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145.

(*g*) *Murphy* v. *Glass*, *supra*.

(*h*) *Davies* v. *Stainbank* (1855), 6 De G. M. & G. 679, C. A.; *Thornton* v. *M'Kewan* (1862), 1 Hem. & M. 525; *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687; *Jenner* v. *Morris* (1861), 3 De G. F. & J. 45, *per* Lord CAMPBELL, L.C., at p. 54. The foreign drawer of a bill accepted in England can, as against the holder in England, avail himself of a set-off on which the acceptor can, by foreign though not by English law, rely, as extinguishing the acceptor's debt, and therefore the liability of such drawer as surety in respect thereof (*Allen* v. *Kemble* (1848), 6 Moo. P. C. C. 314).

(*i*) See Bullen and Leake's Precedents in Pleading, 6th ed., p. 775; and title PLEADING.

funds in respect of the guaranteed debt one of which the surety cannot avail himself of, to resort to the other first (*j*).

SECT. 3. Rights on Payment being demanded.

962. Where the creditor has security for a different debt from that guaranteed by the surety, and can consolidate such security with another held by him for the guaranteed debt, the surety may have the securities marshalled in his favour; that is to say, after the creditor has been paid in full the surety has a right to be recouped, not only out of the security for the guaranteed debt, but also, in case of any deficiency, out of the other security, and to insist, where the latter security is sufficient to cover both debts, upon having the guaranteed debt liquidated out of it (*k*).

Marshalling of securities in favour of surety.

SECT. 4.—*Rights after Payment.*

963. Money improperly paid by a surety to the creditor in ignorance of fact can be recovered (*l*), but not, apparently, money paid in ignorance of the general law (*m*). A co-surety should not be joined in such an action (*n*).

Right to recover money improperly paid.

964. As soon as the surety has paid to the creditor what is due to the latter under the guarantee, he is entitled, unless he has waived them (*o*), to be subrogated to all the rights possessed by the creditor in respect of the debt, default, or miscarriages, to which the guarantee relates (*p*).

Right of subrogation.

Thus the surety has, on payment, but not before (*q*), a right to the benefit of all the securities, whether known to him or not at the

Right to securities for guaranteed debt.

(*j*) *Ex parte Kendall* (1811), 17 Ves. 514; *The Chioggia*, [1898] P. 1.

(*k*) *Heyman* v. *Dubois* (1871), L. R. 13 Eq, 158; *Praed* v. *Gardiner* (1788), 2 Cox, Eq. Cas. 86; *Re Holland, Ex parte Alston* (1868), 4 Ch. App. 168; *Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A.; *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 388, 389; Story, s. 638; and see also *Drew* v. *Lockett* (1863), 32 Beav. 499; *Wright* v. *Morley, Morley* v. *St. Alban* (1805), 11 Ves. 12, 22; *Newton* v. *Chorlton* (1853), 10 Hare, 646. As to the right of a mortgagee to marshall securities against a surety, see *South* v. *Bloxam* (1865), 2 Hem. & M. 457, and p. 514, *post*; and, generally, titles EQUITY, Vol. XIII., pp. 142 *et seq.*; MORTGAGE.

(*l*) *Mills* v. *Alderbury Union Guardians* (1849), 3 Exch. 590.

(*m*) See *British Workman's and General Assurance Co., Ltd.* v. *Cunliffe* (1902), 18 T. L. R. 502, C. A.; *Re Carnac, Ex parte Simmonds* (1885), 16 Q. B. D. 308, C. A; and as to mistake of law, see generally, title MISTAKE.

(*n*) *Mills* v. *Alderbury Union Guardians, supra.*

(*o*) As to waiver of a surety's rights, see pp. 515 *et seq., post.*

(*p*) *Morgan* v. *Seymour* (1637), 1 Rep. Ch. 64 [120]. Persons claiming to be subrogated to the rights of others can only have the rights possessed by those whose position they take (*The Millwall*, [1905] P. 155, C. A., *per* COLLINS, M.R., at p. 163). As to the rights of subrogation possessed by insurers, see *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517, where the underwriters of a policy of insurance for payment of the debentures of a public company, on satisfying their liability under the policy, were held entitled to be subrogated to the creditor's rights; and see title INSURANCE. As to rights of subrogation possessed by trade creditors of a company in respect of dealings with its receiver and manager, see *Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd.* v. *British Power Traction and Lighting Co., Ltd.*, [1910] 2 Ch. 470.

(*q*) *Re Howe, Ex parte Brett* (1871), 6 Ch. App. 838, *per* MELLISH, L.J., at p. 841; and see *Re Jeffery's Policy* (1872), 20 W. R. 857; *Lake* v. *Brutton* (1856), 8 De G. M. & G. 440, C. A. The right of a surety to a collateral security is not in abeyance till he is called upon to pay (*Dixon* v. *Steel*, [1901] 2 Ch. 602, 607; and see p. 505, *ante*).

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time when he became surety (*r*), which the creditor has received from the principal debtor (*s*), before, contemporaneously with, or after the creation of the suretyship (*a*), and whether or not they existed at the time when the guarantee was given (*b*). Moneys which by contract are appropriated to a particular purpose stand, as regards the surety, on the same footing as securities (*c*). Moreover, if the creditor assigns the guaranteed debt and the securities for the same (*d*), such assignment is subject to the obligation to preserve the securities for the benefit of the surety (*e*).

Origin of right.

The right of the surety to the creditor's securities, on payment of the guaranteed debt is derived from the obligation imposed on the principal debtor of indemnifying the surety (*f*), which makes it inequitable for a creditor, by electing not to avail himself of the securities for the guaranteed debt, to throw the whole liability on the surety (*g*). This right, which prevents the creditor from appropriating a security for the guaranteed debt to the payment of any other debt or liability (*h*), does not rest upon contract, but upon

(*r*) *Forbes* v. *Jackson* (1882), 19 Ch. D. 615; *Leicestershire Banking Co.* v. *Hawkins* (1900), 16 T. L. R. 317; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192, C. A.; *Mayhew* v. *Crickett* (1818), 2 Swan. 185, 191; *Pearl* v. *Deacon* (1857), 24 Beav. 186; *Lake* v. *Brutton* (1856), 8 De G. M. & G. 440, C. A.; *Merchants' Bank of London* v. *Maud* (1870), 19 W. R. 657; *Yonge* v. *Reynell* (1852), 9 Hare, 809; *Hodgson* v. *Shaw* (1834), 3 My. & K. 183; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160. A guarantee by one partner for the debt of the firm, which gives the creditor a right of proof against the separate estate of that partner, in addition to his right of proof against the joint estate of the partnership, is a security within the meaning of the principle laid down in *Re Holland, Ex parte Alston* (1868), 4 Ch. App. 168; *Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A., *per* FRY, L.J., at p. 153, and to which, therefore, a person standing in the position of a surety is entitled (*ibid.*).

(*s*) *Ex parte Crisp* (1744), 1 Atk. 133; *Goddard* v. *Whyte* (1860), 2 Giff. 449; *O'Carrol's (Sir Daniel) Case* (1745), Amb. 61; *Duncan, Fox & Co.* v. *North and South Wales Bank, supra; Brandon* v. *Brandon* (1859), 3 De G. & J. 524; *Parsons* v. *Briddock* (1708), 2 Vern. 608; *Morgan* v. *Seymour* (1637), 1 Rep. Ch. 64 [120]; *Craythorne* v. *Swinburne, supra; Mayhew* v. *Crickett, supra; Wright* v. *Morley* (1805), 11 Ves. 12; *Pledge* v. *Buss* (1860), John. 663; *Ex parte Rushforth* (1804), 10 Ves. 409; *Robinson* v. *Wilson* (1814), 2 Madd. 434; *Hodgson* v. *Shaw, supra; Strange* v. *Fooks* (1863), 4 Giff. 408; *Swain* v. *Wall* (1641), 1 Rep. Ch. 80 [149].

(*a*) *Forbes* v. *Jackson, supra*, at p. 621; *Pledge* v. *Buss, supra; Lake* v. *Bruttor, supra; Campbell* v. *Rothwell* (1877), 47 L. J. (Q. B.) 144; *Re Davison's Estate*, [1894] 1 I. R. 56.

(*b*) *Scott* v. *Knox* (1838), 2 Jo. Ex. Ir. 778; and see *Pledge* v. *Buss, supra; Lake* v. *Brutton, supra*. As to the effect of loss of such securities, see p. 561, *post*.

(*c*) *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch. D., 692, C. A., *per* Lord SELBORNE, L.C., at p. 702.

(*d*) See p. 504, *ante*.

(*e*) *Wheatley* v. *Bastow* (1855), 7 De G. M. & G. 261, C. A., *per* TURNER, L.J., at p. 279. As to the creditor's right to surrender the security and prove for the whole debt, if the principal debtor becomes bankrupt without discharging the surety, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 227. In proving for the whole debt, he need not deliver up the guarantee or other collateral security not forming part of the property of the principal debtor (*Re Goodman, Ex parte Goodman* (1818), 3 Madd. 373).

(*f*) *Yonge* v. *Reynell, supra; Nicholas* v. *Ridley*, [1904] 1 Ch. 192, C. A.; *Harberton (Lord)* v. *Bennett* (1829), Beat. 386.

(*g*) *Aldrich* v. *Cooper* (1802), 8 Ves. 381, *per* Lord ELDON, L.C., at p. 389.

(*h*) *Pearl* v. *Deacon* (1857), 1 De G. & J. 461.

general principles of equity similar to those governing the marshalling of funds when one creditor of the same debtor may resort to either of two funds and another creditor to one only (*i*).

Delivery of securities.

965. If securities to which the surety is entitled are not voluntarily given up to him by the creditor, he may compel delivery and bring an action for the purpose (*k*).

Right to the creditor's securities in respect of part of the debt.

966. A surety for a limited sum only has, on payment of such sum, all the rights of the creditor in respect of that amount, and is, therefore, entitled to a share in any security held by the creditor for the whole debt (*l*), or in respect of another demand additional to that for which he became surety (*m*), but not to the benefit of a security given by the principal debtor to the creditor, without the surety's knowledge, at a different time and for another part of the debt to which the suretyship does not extend (*n*).

Right to satisfied securities.

967. Securities which are satisfied and extinguished by the very act of payment are available for the surety who has paid the debt or performed the duty comprised by his guarantee (*o*). A

(*i*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, at p. 12; and see *Heyman* v. *Dubois* (1871), L. R. 13 Eq. 158; *Aldrich* v. *Cooper* (1802), 8 Ves. 381; and p. 509, *ante*. The right is available to the indorser of a bill of exchange on his paying the amount thereof to the discounter of the bill after its dishonour by the acceptor (*Duncan, Fox & Co.* v. *North and South Wales Bank, supra*).

(*k*) *Goddard* v. *Whyte* (1860), 2 Giff. 449.

(*l*) *Goodwin* v. *Gray* (1874), 22 W. R. 312.

(*m*) *Scott* v. *Knox* (1838), 2 Jo. Ex. Ir. 778; and see *Berridge* v. *Berridge* (1890), 44 Ch. D. 168; *Lake* v. *Brutton* (1856), 8 De G. M. & G. 440, C. A. Where two debts were due from a debtor to a creditor, and there was a surety for the second debt only, it was held that as the securities lodged by the debtor with his creditor for the first debt were more than sufficient to pay it, the surety was entitled to the benefit of the surplus towards the liquidation of the second debt (*Praed* v. *Gardiner* (1788), 2 Cox, Eq. Cas. 86; and see *Heyman* v. *Dubois, supra*).

(*n*) *Wade* v. *Coope* (1827), 2 Sim. 155. Thus, where a guarantee is given to a bank by one of its customers, and subsequently successive advances are made by the bank to him, not under the guarantee, but independently thereof, and against securities which, on the repayment of each advance so made, are returned by the bank to its customer, the surety, though he has not been consulted with reference to such transactions, has no valid ground of objection thereto, and the customer is in such circumstances entitled, as against the surety, to retain the securities returned to him by the bank (*Wilkinson* v. *London and County Banking Co.* (1884), 1 T. L. R. 63, H. L.).

(*o*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, which provides that every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor and to use all the remedies and, if need be and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or

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surety whose estate has been resorted to beyond what it is, in equity, bound to bear has the right to have an assignment made to him of every security which the creditor possesses against the principal debtor (*p*), and the satisfied debt is dealt with as still subsisting to the extent to which the surety is improperly resorted to (*q*).

Thus, a surety who incurs an obligation on behalf of a mortgagor to a particular mortgagee and discharges it by payment is entitled to have the mortgage assigned to him as against puisne incumbrancers, who, however, are not thereby injured if they took their security with full knowledge of an existing prior incumbrance (*r*).

Rule applies only to contractual liability.

On the other hand, the principle applies only where the joint liability arose out of contract, and one of two joint tortfeasors, who has paid the damages due under a judgment against him and his co-tortfeasor, is not entitled to an assignment of the judgment to enable him to recover contribution from his co-tortfeasor (*s*). Moreover, a surety is not entitled to have an assignment of the principal security unless he pays the debt in full (*a*).

Enforcement of right to satisfied securities.

The right to an assignment of satisfied securities must be enforced by action (*b*). The surety may recover as damages, where the creditor has refused to assign the judgment debt, the value of the specific assets which would have been available for execution under the judgment, if it had been duly assigned, without showing, in the first instance, that there were no other assets available (*c*). The right to stand in the place of a judgment creditor and to enforce such right is not affected by the circumstance that actual assignment of the judgment has not been obtained (*d*).

Right of subrogation of surety for Crown debtor.

A surety for a Crown debtor, on paying the debt of his principal, is entitled to an order that he shall be placed in the situation of the Crown, and to have a writ of extent put in force on his behalf (*e*).

Right to transfer of mortgage security.

968. Where the guaranteed debt is secured by a mortgage, the surety is, on payment of such debt, entitled to a transfer of such

performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him; provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between the parties themselves, such last-mentioned person shall be justly liable.

(*p*) *Silk* v. *Eyre* (1875), 9 I. R. Eq. 393, 395.

(*q*) *Ibid.*, *per* CHATTERTON, V.-C., at p. 395; and see *Batchellor* v. *Lawrence* (1861), 9 C. B. (N. S.) 543.

(*r*) *Re Davison's Estate* (1893), 31 L. R. Ir. 249; affirmed, [1894] 1 I. R. 56, C. A.; and see p. 513, *post*.

(*s*) *The Englishman and The Australia*, [1895] P. 212.

(*a*) *Ewart* v. *Latta* (1865), 4 Macq. 983, H. L.; and see *Re Howe*, *Ex parte Brett* (1871), 6 Ch. App. 838, 841. A right of distress for rent in arrear is not a security held by a creditor in respect of a debt and capable of being assigned, and therefore is outside the statute (*Re Russell*, *Russell* v. *Shoolbred* (1885), 29 Ch. D. 254, C. A.).

(*b*) *Phillips* v. *Dickson* (1860), 8 C. B. (N. S.) 391; and see *The Englishman and The Australia*, *supra*.

(*c*) *Oddy* v. *Hallett* (1885), Cab. & El. 532.

(*d*) *Re M'Myn*, *Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575.

(*e*) *R.* v. *Salter* (1856), 1 H. & N. 274; *R.* v. *Robinson* (1855), 1 H. & N. 275, n.; and compare p. 523, *post*. For writs of extent, see title CROWN PRACTICE, Vol. X., p. 14.

mortgage (*f*), even though he was not originally aware of its existence (*g*). Prior to such transfer a surety for payment of the mortgage debt itself has, on payment of any portion thereof, an equitable charge (*h*) arising automatically, which is not, however, regarded as being an interest in the mortgaged lands (*i*). It need not therefore, and apparently cannot, be registered, but is sufficiently protected by the original registration of the mortgage deed out of which such charge arises (*k*).

Where a mortgage debt is in fact paid out of charges created by the surety further to secure the mortgage debt, he is entitled to the benefit of the mortgagee's securities against the mortgagor's lands, although according to the proviso for redemption in the event of the mortgagor or his surety repaying the mortgage debt, the mortgagee undertakes to reconvey the lands and charges to the uses on which they were held before the execution of the mortgage deed (*l*). Moreover, a surety who mortgages his own property as collateral security for a mortgage debt secured on another property has an interest in the latter property and is a necessary party to an action for foreclosure or redemption thereof (*m*).

Position of surety redeeming a mortgage.

When the surety redeems the mortgage debt, which he is clearly entitled to do (*n*), he is deemed to do so for his own benefit, and is not presumed, like the mortgagor, to have done so for the benefit of puisne incumbrancers; for the surety is not in privity with them, and towards them he has undertaken no obligation for the discharge of their debts (*o*); nor are they injured where they took their security with full knowledge of existing prior incumbrances (*p*).

(*f*) *Copis* v. *Middleton* (1823), Turn. & R. 224; *Hodgson* v. *Shaw* (1834), 3 My. & K. 183, *per* Lord BROUGHAM, L.C., at p. 189. Some observations of WOOD, V.-C., in *South* v. *Bloxam* (1865), 2 Hem. & M. 457, created a doubt whether the right of the surety, as such, to the benefit of securities held by the creditor, arises until the surety pays the guaranteed debt. According to subsequent decisions, however, the right of a surety to a collateral security is not in abeyance until he is called upon to pay (*Dixon* v. *Steel*, [1901] 2 Ch. 602; and see *Lake* v. *Brutton* (1856), 2 Jur. (N. S.) 839, C. A.; *Pledge* v. *Buss* (1860), John. 663; and p. 509, *ante*).

(*g*) *Mayhew* v. *Crickett* (1818), 2 Swan. 185; and see *Goddard* v. *Whyte* (1860), 2 Giff. 449; *Allen* v. *De Lisle* (1856), 3 Jur. (N. S.) 928; *Re Davison's Estate* (1893), 31 L. R. Ir. 249; affirmed, [1894] 1 I. R. 56, C. A.

(*h*) *Gedye* v. *Matson* (1858), 25 Beav. 310; *Green* v. *Wynn* (1869), 4 Ch. App. 204; *Allen* v. *De Lisle*, *supra*; *Re Davison's Estate*, *supra*; see also p. 522, *post*.

(*i*) *Kennedy* v. *Campbell*, [1899] 1 I. R. 59. It is, therefore, not affected by a judgment registered against the surety under the Judgment Mortgage (Ireland) Act, 1850 (13 & 14 Vict. c. 29) (*Kennedy* v. *Campbell*, *supra*). As to transfer of mortgages, see title MORTGAGE.

(*k*) Such a charge need not, therefore, it is submitted, be registered under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1) (d). Equitable charges, which are not, like that of a surety paying the mortgage debt, substitutional, but additional, should be registered under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14; see *Jones* v. *Barker*, [1909] 1 Ch. 321; and title REAL PROPERTY AND CHATTELS REAL.

(*l*) *M'Neale* v. *Reed* (1857), 7 I. Ch. R. 251.

(*m*) *Stokes* v. *Clendon* (1790), 2 Swan. 150, n. As to a wife charging her property as surety for her husband, see title HUSBAND AND WIFE.

(*n*) *Wade* v. *Coope* (1827), 2 Sim. 155; *Green* v. *Wynn* (1869), 4 Ch. App. 204.

(*o*) *Re Davison's Estate*, *supra*; and see *Allen* v. *De Lisle* (1856), 5 W. R. 158.

(*p*) *Ibid.*; and see *Sawyer* v. *Goodwin* (1875), 1 Ch. D. 351, C. A. However, where the owner of two lots of land mortgages one of them, his surety is not

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Right of tacking.

969. Whether the right of a surety to a transfer of a mortgage can be postponed until he has paid off, in addition to the sum originally advanced and in respect of which he is surety, such further advances as may subsequently have been made, is doubtful (*q*). There can, however, be no such postponement where the surety was wholly ignorant of the subsequent advances having been made, and such advances were not contemplated at the time of the original loan (*r*), nor where there is a special contract excluding the right to tack a second advance to one previously made (*s*). On the other hand, where the alleged surety is really a principal debtor, he cannot claim the rights of a surety (*t*), and therefore the right of tacking against such a person and his personal representatives will be upheld (*a*).

Consolidation of mortgages.

970. The position of the surety with regard to the right of a mortgagee to whom two properties have been separately mortgaged to insist on both mortgage debts being paid off as a condition of the redemption of either property, is superior to that of a second mortgagee; for the second mortgagee is necessarily a complete stranger to the first mortgagee, whilst between the first mortgagee and the surety a contract exists under which the surety has certain rights and equities which must not be impaired by the exercise of the right of consolidation or otherwise, and which bind the mortgage securities into whatever hands they may come (*b*). Where,

entitled, on payment of the mortgage debt, to stand in the place of the mortgagee as to that lot, where the other lot has been conveyed to him by the mortgagor by way of indemnity (*Cooper* v. *Jenkins* (1863), 32 Beav. 337; but see *Brandon* v. *Brandon* (1859), 3 De G. & J. 524; *Lake* v. *Brutton* (1856), 8 De G. M. & G. 440, C. A.).

(*q*) See *Williams* v. *Owen* (1843), 13 Sim. 597; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192, C. A. In *Williams* v. *Owen*, *supra*, the right to tack against a surety, who had joined in the covenant in the mortgage deed, was upheld, upon the ground that he must have known of such right, and have impliedly consented to its exercise. This decision was followed in *Farebrother* v. *Wodehouse* (1856), 23 Beav. 18, and was approved of in *Drew* v. *Lockett* (1863), 32 Beav. 499. On the other hand, it was not cited nor followed in *Bowker* v. *Bull* (1850), 1 Sim. (N. S.) 29, and was disapproved in *Re Kirkwood's Estate* (1878), 1 L. R. Ir. 108; *Dawson* v. *Bank of Whitehaven* (1877), 4 Ch. D. 639; and in *Forbes* v. *Jackson* (1882), 19 Ch. D. 615, where HALL, V.-C., lays down this principle, namely, that the surety in effect bargains that the securities which the creditor takes shall be for the surety, if and when he shall be called upon to make any payment, and that it is the duty of the creditor to keep the securities intact, and not to give them up and burden them with further advances. As to tacking generally, see title MORTGAGE.

(*r*) *Forbes* v. *Jackson*, *supra*; *Newton* v. *Chorlton* (1853), 10 Hare, 646. Sometimes the security expressly gives to the debtor an option to call for further advances (*West* v. *Williams*, [1898] 1 Ch. 488). In such circumstances a surety might, as in *Williams* v. *Owen*, *supra*, be held to have agreed that, should the option be exercised, the right to tack might be put in force against him.

(*s*) *Bowker* v. *Bull*, *supra*.

(*t*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, L.C., at p. 11.

(*a*) *Nicholas* v. *Ridley*, *supra*.

(*b*) *Bowker* v. *Bull*, *supra*, *per* Lord CRANWORTH, V.-C., at pp. 34, 36; and see *Drew* v. *Lockett*, *supra*; *Forbes* v. *Jackson*, *supra*; *Nicholas* v. *Ridley*, *supra*. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), by s. 17, provides that a mortgagor seeking to redeem any one mortgage shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims,

however, the surety has in the mortgage deed expressly covenanted that, as between himself and the mortgagee, he is to be treated and regarded as a principal debtor, the right of consolidation can, apparently, be exercised against him (*c*) in cases where it can be exercised against the mortgagor (*d*). This right can only arise when all the mortgages were originally made by the same mortgagor, and it is not enough that the different equities of redemption have got into the same hands by assignment (*e*).

Costs of unsuccessful defence by surety.

The surety himself is not entitled, as against a second mortgagee, to tack to the first mortgage, on its transfer to him by the creditor, the costs of unsuccessfully defending an action brought against him by the latter on his suretyship covenant (*f*).

Time allowed for redemption.

971. Where an action for foreclosure is brought one period only of six months is allowed for redemption to the mortgagor and his surety, and not a period of six months to each in succession (*g*).

Right to all the creditor's equities.

972. Besides his right to securities held by the creditor for the guaranteed debt, the surety is entitled to all the equities which the creditor could have enforced, and these prevail not only against the creditor himself, but also against all persons claiming under the principal debtor (*h*).

SECT. 5.—*Waiver of Rights.*

Surety may waive his rights of subrogation.

973. The rights which the surety possesses of standing in the creditor's place as regards the latter's securities and equities, and on the bankruptcy of the principal debtor, may be waived by express words in the contract of suretyship itself (*i*), or else impliedly by the

on property other than that comprised in the mortgage which he seeks to redeem, unless a contrary intention is expressed in the mortgage deeds, or one of them. As to consolidation generally, see title MORTGAGE.

(*c*) See *Farebrother* v. *Wodehouse* (1856), 23 Beav. 18; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192, C. A.; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, L.C., at p. 11.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17; and see *Griffith v. Pound* (1890), 45 Ch. D. 553.

(*e*) *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

(*f*) *South* v. *Bloxam* (1865), 2 Hem. & M. 457. In this case, which was subsequently explained in *Dixon* v. *Steel*, [1901] 2 Ch. 602, it was also held that the doctrine of marshalling securities might be applied against a surety in favour of a second mortgagee.

(*g*) *Smith* v. *Olding* (1884), 25 Ch. D. 462. A surety who has not paid off the mortgage debt in whole or in part, and is bound only by his personal covenant, is not a necessary party to a foreclosure action (*Gedye* v. *Matson* (1858), 25 Beav. 310).

(*h*) *Drew* v. *Lockett* (1863), 32 Beav. 499; and see *Re Kirkwood's Estate* (1878), 1 L. R. Ir. 108; *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195; *Brandon* v. *Brandon* (1859), 3 De G. & J. 524. As to the surety's rights on the bankruptcy of the principal debtor, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 204 *et seq.*

(*i*) *Re Fernandes, Ex parte Hope* (1844), 3 Mont. D. & De G. 720; *Earle* v. *Oliver* (1848), 2 Exch. 71; *Re Gillespie* (1887), 19 L. R. Ir. 198; *Midland Banking Co.* v. *Chambers* (1869), 4 Ch. App. 398; *Metropolitan Bank of England and Wales* v. *Coppee* (1896), 12 T. L. R. 258, C. A. For forms of guarantee containing an express waiver of the surety's rights against the creditor, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 191 *et seq.* It is sometimes agreed between the surety and the creditor that the receipt by the latter

SECT. 5. Waiver of Rights.

surety's acceptance of an indemnity from the principal debtor in lieu of the right he would otherwise have possessed (*k*), or in some other way (*l*). Where there has been an express waiver, the surety, in the event of the principal debtor's bankruptcy, is sometimes not even able to avail himself of a counter-security received by him from the principal debtor by way of indemnity until the creditor has been paid in full (*m*).

Part VII.—The Surety's Rights against the Principal Debtor.

SECT. 1.—*Nature of Rights and how acquired.*

Express right to indemnification.

974. An express right to indemnification may be conferred upon the surety by the principal debtor (*n*), and in that case there can be no implied indemnity (*o*). The precise extent of an express indemnity is a question of construction in each particular case (*p*). A joint contract of indemnity, however, is never considered as if it were joint and several (*q*).

The surety's right to indemnification, even in respect of a specialty debt, creates a simple contract debt only (*r*).

Deposit of deeds with surety does not give right to legal mortgage.

Where the indemnity takes the form of a deposit of title deeds with the surety by the principal debtor, and there is no agreement to execute a formal mortgage, the surety is only entitled to insist on having a memorandum signed by the principal debtor, specifying

of dividends in the bankruptcy of the principal debtor shall not diminish the liability of the surety until the creditor has received twenty shillings in the pound (*Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q. B. 12; *Re Sellers, Ex parte Midland Banking Co.* (1878), 38 L. T. 395; *Re Blakeley, Ex parte Aachener Disconto Gesellschaft* (1892), 9 Morr. 173; *Re Rees, Ex parte National Provincial Bank of England* (1881), 17 Ch. D. 98, C. A.; *Re Porter, Ex parte Miles* (1848), De G. 623). A course of dealing between the parties prior to the bankruptcy of the principal debtor will not apparently give rise to the presumption that the surety has abandoned to the creditor his right of proof against the estate of the principal debtor (*Ex parte Johnson* (1853) 3 De G. M. & G. 218).

(*k*) *Cooper* v. *Jenkins* (1863), 32 Beav. 337; and see note (*p*), p. 514, *ante*.

(*l*) *Waugh* v. *Wren* (1862), 11 W. R. 244.

(*m*) *Midland Banking Co.* v. *Chambers* (1869), 4 Ch. App. 398.

(*n*) *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, 556; *Cooper* v. *Jenkins* (1863), 32 Beav. 337. A counter-security given to a surety by a principal debtor, whose good behaviour he has guaranteed, where held by way of indemnity only, reverts to the principal debtor on the discharge of the surety from liability (*M'Mahon* v. *Featherstonhaugh*, [1895] 1 I. R. 182).

(*o*) See p. 447, *ante*, and the cases there cited.

(*p*) *Dumbell* v. *Isle of Man Rail. Co.* (1880), 42 L. T. 745, P. C.; *Re Robinson, Ex parte Burrell* (1875), 1 Ch. D. 537, C. A.; *Re Simons, Ex parte Allard* (1881), 16 Ch. D. 505, C. A.

(*q*) *Sumner* v. *Powell* (1816), 2 Mer. 30; and see note (*m*), p. 502, and note (*g*), p. 504, *ante*.

(*r*) *Ferguson* v. *Gibson* (1872), L. R. 14 Eq. 379, *per* WICKENS, V.-C., at p. 386; and see *Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956; and p. 522, *post*.

the terms of the deposit, and has no right to have a formal legal mortgage executed in his favour (*s*).

Implied rights of surety against the principal debtor.

975. The implied rights possessed by the surety against the principal debtor are not identical with those which the creditor has against the latter (*t*), but are somewhat similar to those possessed by one surety against another (*a*). They are available whenever the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise (*b*), since no one can make himself the creditor of another by volunteering to discharge the latter's obligations (*c*). Once, however, such request has been obtained, an equity of indemnification becomes attendant upon the suretyship (*d*), and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the surety under the guarantee as money paid to the use of the principal debtor (*e*).

Application of 13 Eliz. cc. 4, 5, to surety.

A surety, in respect of his right to be indemnified by the principal debtor, is a purchaser for valuable consideration within the stat. (1571) 13 Eliz. c. 4, so that any lease or conveyance to him by way of indemnity in respect of his liability under his guarantee will be upheld (*f*). He is also, in respect of his right to be indemnified,

(*s*) *Sporle* v. *Whayman* (1855), 20 Beav. 607. A bill of sale given by way of indemnity to a surety is void, because the prescribed form (Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), Schedule) is not applicable to such a security (*Hughes* v. *Little* (1886), 18 Q. B. D. 32, C. A.; but see *Sibley* v. *Higgs* (1885), 15 Q. B. D. 619).

(*t*) *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, 556. Thus, though a creditor who has recovered judgment against one partner cannot sue another partner of the same firm, that rule does not take away the rights of a surety for one partner against another partner (*ibid.*). As to the rights of husband and wife where either is surety for the other, see title HUSBAND AND WIFE.

(*a*) *Woods* v. *Creaghe* (1828), 1 Hog. 313.

(*b*) *Alexander* v. *Vane* (1836), 1 M. & W. 511; *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A.; *Exall* v. *Partridge* (1799), 8 Term Rep. 308, 310; *Re Binns, Lee* v. *Binns*, [1896] 2 Ch. 584, *per* NORTH, J., at p. 588; *Pearce* v. *Blagrave* (1855), 3 C. L. R. 338, 340; *Warrington* v. *Furbor* (1807), 8 East, 242; *Hodgson* v. *Shaw* (1834), 3 My & K. 183, 190; *Morrice* v. *Redwyn* (1731), 2 Barn. (K. B.) 26; *Ware* v. *Horwood* (1807), 14 Ves. 28; *Kearsley* v. *Cole* (1846), 16 M. & W. 128; *Boyd* v. *Brooks* (1865), 34 L. J. (CH.) 605; *Davies* v. *Humphreys* (1840), 6 M. & W. 153; *Huntley* v. *Sanderson* (1832), 1 Cr. & M. 467; *Reynolds* v. *Doyle* (1840), 1 Man. & G. 753; *Kemp* v. *Balls* (1854), 10 Exch. 607; *Jones* v. *Broadhurst* (1850), 9 C. B. 173, 193.

(*c*) *Hodgson* v. *Shaw*, *supra*, *per* Lord BROUGHAM, L.C., at p. 190; and see *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, *per* BRETT, M.R., at pp. 64 *et seq.*; *Johnson* v. *Royal Mail Steam Packet Co.* (1867), L. R. 3 C. P. 38, 43; and see *Ogle* v. *Hay* (1910), *Times*, 28th February.

(*d*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1.

(*e*) *Re Fox, Walker & Co.; Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.; *Exall* v. *Partridge*, *supra*; *Pitt* v. *Purssord* (1841), 8 M. & W. 538; *Warrington* v. *Furbor*, *supra*; *Davies* v. *Humphreys*, *supra*; *Pownal* v. *Ferrand* (1827), 6 B. & C. 439; *Leigh* v. *Dickeson*, *supra*; *Duffield* v. *Scott* (1789), 3 Term Rep. 374. Where a surety for the payment of interest on a mortgage debt pays off both principal and interest on the mortgagor making default, in one sense the money so paid is not money paid to the use of the mortgagor (*Green* v. *Wynn* (1869), 4 Ch. App. 204, *per* Lord HATHERLEY, L.C., at p. 207); but the surety is in such a case entitled to redeem the mortgage, as in no other way can he be indemnified (*ibid.*); and see p. 513, *ante*.

(*f*) *Scot* v. *Bell* (1672), 2 Lev. 70; *Beverly* v. *Gatacre* (1623), 2 Roll. Rep. 305; Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).

SECT. 1. Nature of Rights and how acquired.

"a creditor" of the principal debtor within the stat. (1571) 13 Eliz. c. 5, which extends to future as well as existing debts (*g*).

Mortgagor for debt of another has surety's rights against the latter.

976. A person mortgaging his estate to secure the debt of another stands in the relation of surety towards the person whose debt is thus secured, and can compel him to exonerate the estate (*h*).

A surety for a receiver appointed by the court is entitled to be indemnified out of a balance due to him (*i*).

Where there is no right of indemnification.

In certain cases a surety is not entitled to be indemnified. Thus, where a person has been ordered to find bail for good behaviour during a specified period a contract to indemnify his surety is illegal (*j*). So money deposited with the surety, to be retained until the expiration of such period for his protection against the defendant's default, cannot be recovered, either before or after the expiration, unless the person who deposited it did not take part in the illegality (*k*); and it is immaterial that the defendant has not committed any default and the surety has not been called upon to pay anything (*l*).

Apparently, however, before the illegal purpose has been effected, an action will lie to recover the deposit (*m*), though whether in order to prevent a plaintiff from succeeding in such an action the illegal object itself must be fully carried out is doubtful (*n*).

A surety for payment of an instalment under a deed of composition is not entitled to the benefit of a counter-indemnity received by him from the principal debtor which the creditors have neither sanctioned nor authorised by their resolutions accepting the composition (*o*).

(*g*) See *Barling* v. *Bishopp* (1860), 29 Beav. 417; see title FRAUDULENT AND VOIDABLE CONVEYANCES, pp. 78 *et seq.*, *ante*.

(*h*) *Lee* v. *Rook* (1730), Mos. 318; *Peirs* v. *Peirs* (1750), 1 Ves. Sen. 521; *Evelyn* v. *Evelyn* (1732), 2 P. Wms. 659, 663; Fisher's Law of Mortgage, 6th ed., p. 682: compare *Re Westzinthus* (1833), 5 B. & Ad. 817.

(*i*) *Glossup* v. *Harrison* (1814), 3 Ves. & B. 134.

(*j*) *Consolidated Exploration and Finance Co.* v. *Musgrave*, [1900] 1 Ch. 37; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A.; and see *Cripps* v. *Hartnoll* (1863), 4 B. & S. 414; *Jones* v. *Orchard* (1855), 16 C. B. 614; *R.* v. *Porter*, [1910] 1 K. B. 369, C. C. A. On the other hand, it is not contrary to public policy that sureties under an administration bond should be indemnified by the next of kin (*Blake* v. *Bayne*, [1908] A. C. 371, P. C.); see also p. 446, *ante*.

(*k*) *Consolidated Exploration and Finance Co.* v. *Musgrave*, *supra*, *per* NORTH, J., at p. 42. In this case the plaintiffs recovered from the surety shares which they had transferred to the prisoner for an innocent purpose, and which did not empower the latter to make use of such shares for the purpose of indemnifying the surety.

(*l*) *Herman* v. *Jeuchner*, *supra*, overruling on this point *Wilson* v. *Strugnell* (1881), 7 Q. B. D. 548; and see *Jones* v. *Orchard*, *supra*. The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case (*Simpson* v. *Bloss* (1816), 7 Taunt. 246; *Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309, 314; *Herman* v. *Jeuchner*, *supra*).

(*m*) *Herman* v. *Jeuchner*, *supra*, *per* BOWEN, L.J., at p. 562; *per* BAGGALLAY, L.J., at pp. 564, 565; and see *Tuppenden* v. *Randall* (1801), 2 Bos. & P. 467; *Wilson* v. *Strugnell*, *supra*; *Bone* v. *Ekless* (1860), 5 H. & N. 925; *Fivaz* v. *Nicholls* (1846), 2 C. B. 501.

(*n*) *Herman* v. *Jeuchner*, *supra*, *per* BAGGALLAY, L.J., at p. 565.

(*o*) *Re Simons*, *Ex parte Allard* (1881), 16 Ch. D. 505, C. A.; and see *Wood* v. *Barker* (1865), L. R. 1 Eq. 139. On the other hand, a surety is entitled to retain goods deposited with him by the principal debtor, unknown to the

SECT. 1. Nature of Rights and how acquired.

A surety has no implied right of indemnity against a person who has agreed to indemnify the principal debtor in respect of the guaranteed debt (*p*). Where by an agreement between the surety and the principal debtor the performance of the guarantee by the surety is to operate as payment to the principal debtor of a sum due to him from the surety, the latter's right to indemnification in respect of payment made by him under such guarantee cannot be enforced (*q*).

Abandonment by the surety of his right of indemnity

977. The surety's right to be indemnified by the principal debtor or his estate will not be held to have been abandoned, unless a contract on his part to abandon it has been proved (*r*); and the reservation in a composition deed of a creditor's remedies against a surety necessarily implies the continuance of the surety's right to be indemnified (*s*).

SECT. 2.—*Rights before Satisfaction by Surety of the Guaranteed Debt or Liability.*

Right of surety to exoneration from liability.

978. The surety may, even before payment has been demanded from him or the principal debtor (*t*), call on the latter to exonerate him from liability (*u*), if the creditor has a right to sue the principal debtor and refuses to exercise it (*a*) (and apparently also in other cases (*b*)), and may obtain relief from liability under his guarantee,

latter's creditors, under an agreement to indemnify the surety in consideration of his guaranteeing the instalments under a deed of composition (*Re Robinson, Ex parte Burrell* (1876), 1 Ch. D. 537, C. A.).

(*p*) *Re Law Courts Chambers Co.* (1889), 61 L. T. 669; and see *Crafts* v. *Tritton* (1818), 8 Taunt. 365.

(*q*) *Copland* v. *Miller* (1903), *Times*, 28th November. The existing rules of the Stock Exchange forbid sureties ("recommenders," as they are termed) of persons seeking to join the Stock Exchange from receiving any indemnity (rr. 22, 24, 26).

(*r*) *Close* v. *Close* (1853), 4 De G. M. & G. 176, C. A. Where a wife charges her separate estate as an indemnity to one of two sureties for her husband, the surety so indemnified, by subsequently discharging the other surety from liability to contribution, *pro tanto* releases the wife's estate from such charge (*Hodgson* v. *Hodgson* (1837), 2 Keen, 704; and see *Way* v. *Hearn* (1862), 11 C. B. (N. S.) 774, 782; *Re Gervais' Estate*, [1903] 1 I. R. 172).

(*s*) *Close* v. *Close*, *supra*.

(*t*) *Gray* v. *Phillips* (1905), 13 Scots Law Times, 145; *Doig* v. *Lawrie* (1903), 5 F. (Ct. of Sess.) 295.

(*u*) *Antrobus* v. *Davidson* (1817), 3 Mer. 569, *per* GRANT, M.R., at p. 579; *Swire* v. *Redman* (1876), 1 Q. B. D. 536, 541; *Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372, *per* WILLES, J., at p. 377; *Nisbet* v. *Smith* (1789), 2 Bro. C. C. 579, *per* Lord THURLOW, L.C., at p. 582; *Alcoy and Gandia Rail. and Harbour Co.* v. *Greenhill* (1897), 76 L. T., *per* STIRLING, J., at p. 553; *Lee* v. *Rook* (1730), Mos. 318, *per* JEKYLL, M.R., at p. 318; *Cock* v. *Ravie* (1801), 6 Ves. 283; *Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410; *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), 3 Ch. App. 791. A surety for the payment of interest only on a mortgage debt is entitled to insist on the mortgagor paying that debt, and if he will not do so, to pay it himself and charge the mortgagor with the amount so paid and obtain indemnification by redeeming the mortgage (*Green* v. *Wynn* (1869), 4 Ch. App. 204, *per* Lord HATHERLEY, L.C., at p. 207; compare *Re Westzinthus* (1833), 5 B. & Ad. 817; and see note (*e*), p. 517, *ante*).

(*a*) *Padwick* v. *Stanley* (1852), 9 Hare, 627; disapproved in *Mathews* v. *Saurin* (1893), 31 L. R. Ir. 181, and *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401, *per* SWINFEN EADY, J., at p. 408.

(*b*) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, *supra*, *per* SWINFEN EADY, J., at p. 408; and see *Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410.

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although he has not paid (*c*). If his claim to be indemnified is denied, he can obtain a declaration that he has a right to be relieved from liability (*d*), which relief is not limited to cases where the creditor has a right to sue the debtor which he refuses to exercise (*e*). The surety is also entitled to have a sufficient sum set apart to meet the claim for an indemnity (*f*).

Whether a declaration may be obtained for a prospective right to indemnity before it has actually arisen is not so clear (*g*), though, apparently, where it has arisen, the court will declare the right to indemnity generally with liberty to apply from time to time to work it out (*h*).

An unpaid creditor who is a party to the action, in which an indemnity is claimed, should apparently be paid the sum awarded, but where he is not a party the person seeking indemnity is, it appears, entitled to have the money paid to him (*i*).

Declaration of relief from further liability.

979. A surety may also, by means of an action brought before payment against the principal debtor and creditor, obtain a declaration that he is relieved from all further liability under his guarantee where the acts and conduct of the creditor and principal debtor have in fact so relieved him (*j*).

Right of surety to recover damages.

980. By express contract the surety may before payment be entitled to recover damages from the principal debtor where, for instance, the principal debtor covenants with the surety to pay the amount due to the creditor on a day named and then makes default (*k*).

(*c*) *Johnston* v. *Salvage Association* (1887) 19 Q. B. D. 458, C. A., *per* LINDLEY, L.J., at pp. 460, 461; *Ranelaugh (Earl)* v. *Hayes* (1683), 1 Vern. 189, *per* NORTH, Lord Keeper (afterwards Lord GUILDFORD), at p. 190; *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, 47, C. A.; *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256; *Mathews* v *Saurin* (1893), 31 L. R. Ir. 181; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Robinson* v. *Harkin*, [1896] 2 Ch. 415, 426; *Ellis* v. *Pond*, [1898] 1 Q. B. 426, 454, C. A.; *Lacey* v. *Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182; *Halstead* v. *Freeland* (1904), *Times*, 25th July; *contra*, *Lloyd* v. *Dimmack* (1877), 7 Ch. D. 398; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561; *Shepheard* v. *Bray*, [1906] 2 Ch. 235; settled, [1907] 2 Ch. 571, C. A. But a payment or charge on property made by a principal debtor, to or for the benefit of the surety, will not necessarily operate to indemnify the latter in respect of the liability he has contracted under his guarantee. Thus, a payment made by the principal debtor which amounts to a fraudulent preference of the surety will not benefit the latter, but will be void altogether; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 281 *et seq.*

(*d*) *Hobbs* v. *Wayet*, *supra*, *per* KEKEWICH, J., at p. 259; *Lacey* v. *Hill, Crowley's Claim*, *supra*.

(*e*) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401, following *Mathews* v. *Saurin*, *supra*, and disapproving *Padwick* v. *Stanley* (1852), 9 Hare, 627.

(*f*) *Lacey* v. *Hill, Crowley's Claim*, *supra*, *per* JESSEL, M.R., at p. 191.

(*g*) *Lloyd* v. *Dimmack*, *supra*; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, *supra*, at p. 565.

(*h*) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, *supra*, *per* FRY, J., at p. 565; and see *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, *supra*; Seton, Judgments and Orders, 6th ed., Vol. II., p. 1168. As to the general effect of an order with "liberty to apply," see title JUDGMENTS AND ORDERS.

(*i*) *Lacey* v. *Hill, Crowley's Claim*, *supra*, *per* JESSEL, M.R., at p. 191.

(*j*) *Wilson* v. *Lloyd* (1873), 21 W. R. 507; *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207, H. L.; and see *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, *supra*.

(*k*) *Loosemore* v. *Radford* (1842), 9 M. & W. 657; *Toussaint* v. *Martinnant*

SECT. 2. Rights before Satisfaction by Surety.

981. The surety cannot, on the principal debtor becoming insolvent, exercise, in his own name, the right of stoppage *in transitu* (*l*), though apparently, if the surety for an insolvent buyer should pay the vendor, he has such right, if not in his own name, at all events in that of the vendor (*m*).

Stoppage *in transitu*.

SECT. 3.—*Rights after Satisfaction by Surety of the Guaranteed Debt or Liability.*

On payment of part of guaranteed debt.

982. The surety, as often as he pays anything under his guarantee in relief of the principal debtor, has an immediate right of action against the latter (*n*), though he cannot accelerate his remedy by paying the guaranteed debt before it becomes legally due (*o*). Consequently, the principal debtor may be exposed to several actions at the suit of the same surety, from which inconvenience and hardship he is not protected by any rule of law requiring the surety to pay the whole debt due from the principal debtor before compelling reimbursement from the latter (*p*).

What is payment entitling the surety to indemnification.

The taking of the surety's goods in execution (*q*), or the payment by him of money to prevent the execution (*r*), is equivalent to payment (*a*) entitling him to indemnification. It is doubtful whether the giving by him of a promissory note to the creditor has this effect (*b*). On the other hand, the giving of a

(1787), 2 Term Rep. 100; *Penny* v. *Foy* (1828), 8 B. & C. 11; *Hodgson* v. *Bell* (1797), 7 Term Rep. 97; *Carr* v. *Roberts* (1833), 5 B. & Ad. 78; *Martin* v. *Court* (1788), 2 Term Rep. 640.

(*l*) *Siffken* v. *Wray* (1805), 6 East, 371. A broker for an undisclosed principal (whose position is somewhat analogous to that of a surety) may, in certain circumstances, exercise the right of stoppage *in transitu* (*Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195). As to the effect of an attempted stoppage by an unpaid vendor, see *Re Westzinthus* (1833), 5 B. & Ad. 817.

(*m*) Under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; see p. 511, *ante;* Benjamin on Sales, 4th ed., pp. 845, 846. The surety for a company may, as a contingent or prospective creditor (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1); and see *Re British Equitable Bond and Mortgage Corporation, Ltd.*, [1910] W. N. 53), before payment made by him of the guaranteed debt, present a petition to have such company wound up, though formerly he could not have done so (*Re Vron Colliery Co.* (1882), 20 Ch. D. 442, C. A.). A winding-up order cannot, however, be obtained by the surety in respect of a mortgage debt of another company, which has assigned the equity of redemption to the company petitioned against, on the terms that the latter indemnifies the former, even if he has paid part of the debt (*Re Law Courts Chambers Co., Ltd.* (1889), 61 L. T. 669); see title COMPANIES, Vol. V., pp. 398 *et seq.*

(*n*) *Davies* v. *Humphreys* (1840), 6 M. & W. 153; *Taylor* v. *Mills* (1777), 2 Cowp. 525; *Paul* v. *Jones* (1787), 1 Term Rep. 599; *Ware* v. *Horwood* (1807), 14 Ves. 28.

(*o*) See *Coppin* v. *Gray* (1842), 1 Y. & C. Ch. Cas. 205.

(*p*) *Davies* v. *Humphreys, supra, per* PARKE, B., at p. 167.

(*q*) *Rodgers* v. *Maw* (1846), 15 M. & W. 444.

(*r*) *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A.; *Exall* v. *Partridge* (1799), 8 Term Rep. 308.

(*a*) As to what amounts to payment by a surety claiming contribution from a co-surety, see pp. 530, 531, *post.*

(*b*) *Barclay* v. *Gooch* (1797), 2 Esp. 571; *Rodgers* v. *Maw, supra, per* POLLOCK, C.B., at p. 449; *M'Kenna* v. *Harnett* (1849), 13 I. L. R. 206; *Taylor* v. *Higgins* (1802), 3 East, 169; *Maxwell* v. *Jameson* (1818), 2 B. & Ald. 51; but see *Re Roberts, Ex*

SECT. 3. Rights after Satisfaction by Surety.

bond by the surety to the creditor (*c*) or the substitution of one bond for another (*d*) is not equivalent to payment, nor will the payment of part of the guaranteed debt by the surety, together with an indemnity from the creditor against personal liability in respect of the balance thereof (*e*), operate as a full payment of the guaranteed debt.

Evidence of payment required.

Slight evidence of payment suffices (*f*), especially where there is an admission, by silence or otherwise, on the part of the principal debtor of due payment having been made by the surety (*g*).

Rights of surety for mortgage debt.

A surety for payment of the mortgage debt by the mortgagor is entitled, on liquidating any portion thereof, to an equitable charge *pro tanto* on the property mortgaged (*h*). This charge arises automatically in respect of each payment made, and is substitutional and not additional (*i*). When on payment of the whole mortgage debt by the surety a transfer of the mortgage is made to him, or a judgment declaring his right thereto is given, he takes the place of the mortgagee (*k*). Till then, however, he has no such estate in the mortgaged lands as would be affected by a registration of a judgment against him (*l*), or which, apparently, need be or could be registered.

Position of surety after payment.

983. A surety who has paid the creditor in relief of the principal debtor becomes to that extent a creditor of the latter (*m*), but only a simple contract creditor, even where the original contract under which his liability arises is under seal (*n*). A surety to the

parte Allen (1859), 3 De G. & J. 447, C. A. Where a surety, under a joint and several promissory note with the principal debtor, gives to the creditor, when the note is overdue, in payment and discharge thereof, his own sole note, and is accepted as sole debtor and afterwards executes to the creditor a mortgage of his (the surety's) own property, of adequate value to secure payment of the principal debt and interest, even though such note and mortgage remain unsatisfied, the surety is, nevertheless, entitled to maintain an action against the principal debtor for money paid (*Gore* v. *Gore*, [1901] 2 I.R. 269; and see *M'Kenna* v. *Harnett* (1849), 13 I. L. R. 206; *Fahey* v. *Frawley* (1890), 26 L. R. Ir. 78).

(*c*) *Maxwell* v. *Jameson* (1818), 2 B. & Ald. 51; *Taylor* v. *Higgins* (1802), 3 East, 169.

(*d*) *Re Parkinson, Ex parte Serjeant* (1825), 2 Gl. & J. 23.

(*e*) *Soutten* v. *Soutten* (1822), 5 B. & Ald. 852.

(*f*) *Price* v. *Burva* (1857), 6 W. R. 40.

(*g*) *Ibid.*

(*h*) *Gedye* v. *Matson* (1858), 25 Beav. 310; *Allen* v. *De Lisle* (1856), 3 Jur. (N. S.) 928; *Green* v. *Wynn* (1869), 4 Ch. App. 204; *Re Davison's Estate* (1893), 31 L. R. Ir. 249, *per* MONROE, J., at p. 255; affirmed, [1894] 1 I. R. 56, C. A.

(*i*) See p. 513, *ante*.

(*k*) *Mayhew* v. *Crickett* (1818), 2 Swan. 186, 191.

(*l*) *Kennedy* v. *Campbell*, [1899] 1 I. R. 59; and see p. 513, *ante*.

(*m*) If payment is made after the debtor's death the surety is a creditor of the estate, and as such may be entitled to administration (*Williams* v. *Jukes* (1864), 34 L. J. (P. M. & A.) 60; and see *Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410).

(*n*) *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, *per* STIRLING, J., at p. 556; *Copis* v. *Middleton* (1823), Turn. & R. 224; *Simpkins* v. *Poulett* (1824), 2 L. J. (O. S.) (CH.) 81; and see p. 516, *ante*. As specialty and simple contract debts now rank together in the administration of assets of a deceased person (Administration of Estates Act, 1869 (32 & 33 Vict. c. 46)), and as the insolvent estates of deceased persons are now administered as in bankruptcy (Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10; and see *Re Whitaker, Whitaker* v. *Palmer*,

SECT. 3. Rights after Satisfaction by Surety.

Crown, however, on paying off the debt of a deceased principal debtor, is entitled to the Crown's priority in the administration of the deceased's estate (*o*). A surety who has paid the amount secured on the principal debtor's property is entitled to a lien thereon (*p*).

Right to indemnification.

984. The surety's right of indemnification is a right to be recouped the amount which he has actually paid for the principal debtor with interest (*q*), to which he is entitled because of his right to full indemnification from the principal debtor (*r*). Should the surety have sustained damage beyond the principal and interest which he has been compelled to pay under his guarantee, he is entitled to recover such damage also (*s*). On his death the amount expended in respect of the suretyship is a debt due to his estate (*a*).

Recovery of damages sustained.

A surety for an insolvent company which is being wound up is entitled to interest on all sums paid by him under his guarantee before the date of the winding-up order (*b*), but not to interest

[1901] 1 Ch. 9, C. A.), the distinction between specialty and simple contract debts no longer possesses the importance which once attached to it, especially as in the case of a surety he can now, by virtue of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5 (see p. 511, *ante*), indemnify himself by means of a bond or other security, though satisfied, held by the creditor in respect of the debt or liability to which the suretyship relates. However, the surety, as a simple contract creditor, may, should the debt guaranteed be a specialty debt, be sooner barred of his remedy by the Statute of Limitations than the specialty creditor (*Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, *per* STIRLING, J., at p. 556). Moreover, should the surety be appointed executor of the principal debtor's will, he, as a simple contract creditor, can only exercise his right of retainer as against simple contract creditors (*Re Jones, Calver* v. *Laxton* (1885), 31 Ch. D. 440; and see *Re Allen, Adcock* v. *Evans*, [1896] 2 Ch. 345). See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 239.

(*o*) *Re Churchill (Lord), Manisty* v. *Churchill* (1888), 39 Ch. D. 174; and compare p. 512, *ante*.

(*p*) *Munnings* v. *Bury* (1829), Taml. 147; *Re Jeffery's Policy* (1872), 20 W. R. 857. Thus, where the obligor of several bonds, in which his solicitor has joined as surety, subsequently by deed conveys specified real estate to such solicitor upon trust to sell, and out of the proceeds of sale pay the bond creditors, who have no notice of and are in total ignorance of the existence of such deed, the deed in question is one of agency only, of which the creditors cannot claim the benefit, and the solicitor is therefore entitled to retain the estate thereby conveyed to him, until his discharge from liability as surety under the bonds (*Wilding* v. *Richards* (1845), 1 Coll. 655). So, on a purchase of goods by a broker for an undisclosed principal in a market according to the usage of which such broker is personally liable in default of the principal, and is therefore a *quasi*-surety for the latter, the unpaid vendor's lien will pass to the broker on default made by the principal, even though the latter may have pledged his interest in the goods to third persons and indorsed the delivery order to them (*Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195).

(*q*) *Re Fox, Walker & Co., Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.; *Hitchman* v. *Stewart* (1855), 3 Drew. 271; *Lawson* v. *Wright* (1786), 1 Cox, Eq. Cas. 275.

(*r*) *Petre* v. *Duncombe* (1851), 2 L. M. & P. 107, *per* ERLE, C.J., at pp. 115, 116; *Re Evans, Ex parte Davies* (1897), 32 L. J. 281; but see *Lancaster* v. *Evors* (1847), 10 Beav. 266.

(*s*) *Badeley* v. *Consolidated Bank, supra, per* STIRLING, J., at p. 556. Thus, bail may recover any reasonable expenses they may have incurred in taking their principal into custody for the purpose of surrendering him (*Fisher* v. *Fallows* (1804), 5 Esp. 171).

(*a*) *Willes* v. *Greenhill* (No. 1) (1861), 29 Beav. 376.

(*b*) *Re Beulah Park Estate, Sargood's Claim* (1872), L. R. 15 Eq. 43.

SECT. 3. Rights after Satisfaction by Surety.

accruing subsequently (*c*), nor, where the company is being wound up under supervision, to interest accruing after the date of the confirmatory resolution to wind up (*d*). The surety is not, apparently, entitled to recover compound interest (*e*).

Where debt compounded.

985. A surety who compounds a debt for which he and the principal have become jointly liable can only recover from the latter the amount of the composition agreed to (*f*).

Payments on illegal claims.

986. The surety cannot recover from the principal debtor sums paid in respect of a claim which the surety knows to be illegal (*g*) or void for fraud or immorality (*h*).

Costs.

A surety cannot, generally, recover from the principal debtor the costs of defending an action brought against him on his guarantee, unless he was authorised by the principal debtor to defend it (*i*), nor, apparently, unless such defence was, in the opinion of a jury, reasonable (*j*).

But a surety who is, in the circumstances of the case, entitled to recover from the principal debtor the costs of defending an action, has a right to costs as between solicitor and client (*k*).

Defence by surety to creditor's claim.

987. A surety is not bound to resist the creditor's claim against him if he have no good defence thereto, and may make the best compromise he can in such circumstances and then recover from the principal debtor indemnification in respect of the loss incurred (*l*).

(*c*) *Re International Contract Co., Hughes' Claim* (1872), L. R. 13 Eq. 623; *Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112.

(*d*) *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1870), L. R. 11 Eq. 478.

(*e*) *Rigby* v. *Macnamara* (1795), 2 Cox, Eq. Cas. 415.

(*f*) *Reed* v. *Norris* (1837), 2 My. & Cr. 361. In this case, which was decided before satisfied securities could be assigned to the surety (see p. 511, *ante*), the surety obtained an assignment to a trustee for himself of the debt compounded; see also *Ex parte Rushforth* (1805), 10 Ves. 409.

(*g*) *Chambers* v. *Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588, *per* BLACKBURN, J.

(*h*) *Bryant* v. *Christie* (1816), 1 Stark. 329.

(*i*) *Gillett* v. *Rippon* (1829), Mood. & M. 406; *Smith* v. *Compton* (1832), 3 B. & Ad. 407; *Roach* v. *Thompson* (1830), Mood. & M. 487; *Baxendale* v. *London, Chatham, and Dover Rail. Co.* (1874), L. R. 10 Exch. 34, Ex. Ch., *per* QUAIN, J., at p. 44; *Blyth* v. *Smith* (1843), 5 Man. & G. 405; and see *Knight* v. *Hughes* (1828), 3 C. & P 467; *Tindall* v. *Bell* (1843), 11 M. & W. 228; *Crampton* v. *Walker* (1860), 3 E. & E. 321; *Garrard* v. *Cottrell* (1847), 10 Q. B. 679.

(*j*) *Mors-le-Blanc* v. *Wilson* (1873), L. R. 8 C. P. 227; *Beech* v. *Jones* (1848), 5 C. B. 696; *Fisher* v. *Val de Travers Asphalte Paving Co.* (1876), 1 C. P. D. 511; but see *Baxendale* v. *London, Chatham, and Dover Rail. Co., supra, per* QUAIN, J., at pp. 44, 45. Where the principal debtor was liable to pay "on demand," but failed to do so, and a writ was then issued against the surety by the creditor, it was held that, as such writ was the first notification to the surety of the principal debtor's default, he might recover from the latter the costs of the writ in the action, but not of the subsequent proceedings (*Pierce* v. *Williams* (1854), 23 L. J. (EX.) 322).

(*k*) *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; and compare *Clare* v. *Dobson*, [1910] 1 K. B. 35; and compare pp. 485, 486, *ante*.

(*l*) *Newborough (Lord)* v. *Schröder* (1849), 7 C. B. 342, 399; and see *Pettman* v. *Keble* (1850), 9 C. B. 701. As to the liability of a principal debtor to his

SECT. 3. Rights after Satisfaction by Surety.

However, where a surety seeks to recover under an indemnity bond the loss sustained by him, the mere production of a judgment signed against him by the creditor is not, apparently, of itself sufficient evidence of such loss (*m*).

SECT. 4.—*Enforcement of Rights.*

SUB-SECT. 1.—*Action for Indemnification.*

Surety's action for indemnification.

988. A surety is entitled to maintain an action for indemnification (*n*) either in the High Court or in the county court, according to the amount of his claim (*o*), and he will not be restrained from enforcing his right to be indemnified, even though he may before action brought have made representations of his intention to abandon such right (*p*). If a writ is issued in the High Court, the mode in which the suretyship arose should be stated in the indorsement (*q*).

Surety holding an indemnity under seal should sue thereon.

989. Where the principal debtor has given the surety an indemnity under seal, the surety should sue thereon (*r*), and not merely for money paid to the use of the former, as, in the absence of express stipulation on the subject between the parties, an implied promise to indemnify only exists (*s*).

Though a covenant of indemnity is joint in its terms, yet, if the interest of the covenantees is several, each may sue separately for a breach (*t*).

SUB-SECT. 2.—*Third Party Notice* (*a*).

Indemnification of surety by third party procedure.

990. A surety against whom an action is brought in the High Court on his guarantee may sometimes obtain indemnification by issuing a third party notice against the principal debtor (*b*), but

surety for expenses incurred by the latter in disputing for some time the payment of a just debt guaranteed by him, see *Re Garway, Ex parte Marshall* (1751), 1 Atk. 262.

(*m*) *King* v. *Norman* (1847), 4 C. B. 884; see also *Price* v. *Burva* (1857), 6 W. R. 40.

(*n*) As to the time within which the action must be brought, see title LIMITATION OF ACTIONS. As to a surety's right of retainer where he is executor of the principal debtor, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 257; as to his rights on the bankruptcy of the principal debtor, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 204 *et seq.*; and as to his position on the insolvency of a company, see title COMPANIES, Vol. V., pp. 398 *et seq.*

(*o*) See title COUNTY COURTS, Vol. VIII., pp. 428 *et seq.*

(*p*) *Chadwick* v. *Manning*, [1896] A. C. 231, P. C.; *Jorden* v. *Money* (1854), 5 H. L. Cas. 185.

(*q*) *Ahearn* v. *O'Donovan* (1880), 15 I. L. T. 7.

(*r*) *Toussaint* v. *Martinnant* (1787), 2 Term Rep. 100, 104; and see *Dumbell* v. *Isle of Man Rail. Co.* (1880), 42 L. T. 745, P. C.

(*s*) *Toussaint* v. *Martinnant, supra, per* BULLER, J., at p. 105; and see *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, C. A.

(*t*) *Palmer* v. *Sparshott* (1842), 4 Scott (N. R.), 743; *Withers* v. *Bircham* (1824), 5 Dow. & Ry. (K. B.) 106; *James* v. *Emery and Cludde* (1818), 5 Price, 529. A joint loan never creates in equity a joint and several liability (*Jones* v. *Beach* (1852), 2 De G. M. & G. 886), notwithstanding *dicta* to the contrary (see *Thorpe* v. *Jackson* (1837), 2 Y. & C. (EX.) 553, 561).

(*a*) As to third party notice, see title PRACTICE AND PROCEDURE.

(*b*) See R. S. C., Ord. 16, rr. 48 *et seq.*; County Court Rules, Ord. 11; *Re*

SECT. 4. Enforcement of Rights.

while the surety can thus call in the principal debtor the latter cannot call in the surety (*c*).

When the surety avails himself of this remedy in order to enforce an express contract by the principal debtor to indemnify him, he can sign judgment against the principal debtor before anything has been paid under the guarantee (*d*).

SUB-SECT. 3.—*Set-off and Counterclaim.*

Liability may be set off.

991. A liability under a guarantee may be the subject of a set-off or counterclaim (*e*), even though the party relying on the set-off has collateral security for the debt or liability giving rise to the set-off (*f*).

Exceptions.

Where, however, directors of an unlimited liability company are sureties for it, they cannot, on its being wound up, set off payments made by them after the winding-up order, in discharge of their suretyship liability, against calls made before the filing of the petition, and enforced by a subsequent order, but not yet paid (*g*).

Part VIII.—The Rights and Liabilities of Co-Sureties Inter se.

SECT. 1.—*The Right to Contribution.*

SUB-SECT. 1.—*By and against whom the Right is available.*

How right arises.

992. A surety who has paid more than his share of the common liability is entitled to compel contribution (*h*) from his

Kitchin, Ex parte Young (1881), 17 Ch. D. 668, C. A., *per* JAMES, L.J., at p. 670; *English and Scottish Trust Co.* v. *Flateau* (1887), 36 W. R. 238.

(*c*) *Re Kitchin, Ex parte Young, supra, per* JAMES, L.J., at p. 670.

(*d*) *English and Scottish Trust Co.* v. *Flateau, supra.*

(*e*) See R. S. C., Ord. 19, r. 3; County Court Rules, Ord. 10, r. 2; *McKinnon* v. *Armstrong, Brothers & Co.* (1877), 2 App. Cas. 531; and pp. 504, 505, *ante.* As to set-off generally, see title SET-OFF AND COUNTERCLAIM.

(*f*) *McKinnon* v. *Armstrong, Brothers & Co, supra, per* Lord BLACKBURN, approving Lord ORMIDALE, at p. 542. A surety who is indebted to the principal debtor may set off against such debt a promissory note in the hands of a guaranteed creditor which the latter received from the principal debtor in respect of the guaranteed debt, and to which the surety has become entitled on payment of the guaranteed debt (*Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case* (No. 2) (1865), 4 De G. J. & Sm. 756; compare *Jones* v. *Mossop* (1844), 3 Hare, 568).

(*g*) *Re Norwich Equitable Fire Assurance Co., Brasnett's Case* (1885), 34 W. R. 206, C. A. A sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise is not deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vii.)). As to a surety's right of set-off generally in winding-up proceedings, see title COMPANIES, Vol. V., pp. 502 *et seq.*

(*h*) This right is said to have existed in equity from the very earliest times

co-sureties (*i*), whether they are bound jointly and severally (*k*) or severally (*l*), and by the same or different instruments (*m*), and whether the surety claiming contribution did or did not know, when he became bound as such, that he was co-surety with others (*n*).

Basis of right to contribution.

The right to contribution is not founded on contract, but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit (*o*). In determining whether a relationship is that of

(*Underhill* v. *Horwood* (1804), 10 Ves. 209, *per* Lord ELDON, L.C., at p. 226), and at all events from the time of Elizabeth (*Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, *per* WRIGHT, J., at p. 520), though there is no reported instance of contribution between sureties before the seventeenth century (*ibid.*). This right was not originally recognised at common law (*Offley and Johnson's Case* (1584), 2 Leon. 166; and see *Toussaint* v. *Martinnant* (1787), 2 Term Rep. 100, *per* BULLER, J., at p. 105; and *Edger* v. *Knapp* (1843), 6 Scott (N. R.), 707, *per* TINDAL, C.J., at p. 713), except by the custom of London (*Layer* v. *Nelson* (1687), 1 Vern. 456; *Offley and Johnson's Case, supra;* and see *Wolmershausen* v. *Gullick, supra, per* WRIGHT, J., at p. 520). When contribution became recoverable at common law as well as in equity, the jurisdiction in equity still continued to be more convenient and more extensive. It was more convenient, because, when the sureties were numerous and bound by separate instruments, by a single suit in equity, in which all the sureties were made defendants, it was possible to achieve that which at common law was only accomplished by separate actions against the different sureties to recover their respective contributions (*Craythorne* v. *Swinburne* (1807), 14 Ves. 160, *per* Lord ELDON, L.C., at p. 164; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C.), and it was more extensive because while in equity the proportion of each surety's contribution was regulated by the number of solvent sureties (*Lowe* v. *Dixon* (1885), 16 Q. B. D. 455, 458), at common law the proportion was estimated by and depended on the number of sureties originally liable, whether solvent or not (*Brown* v. *Lee* (1827), 6 B. & C. 689; *Cowell* v. *Edwards* (1800), 2 Bos. & P. 268). The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11), now provides that where there is any variance between the rules of equity and those of common law with reference to the same matter the rules of equity shall prevail.

(*i*) *Cowell* v. *Edwards, supra; Deering* v. *Winchelsea* (*Earl*) (1800), 2 Bos. & P. 270; *Morgan* v. *Seymour* (1637), 1 Rep. Ch. 64 [120]; *Davies* v. *Humphreys* (1840), 6 M. & W. 153, 167; *Reynolds* v. *Wheeler* (1861), 10 C. B. (N. S.) 561; *Kemp* v. *Finden* (1844), 12 M. & W. 421; *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, C. A.; *Macdonald* v. *Whitfield, supra; Brown* v. *Lee, supra; Batard* v. *Hawes* (1853), 2 E. & B. 287; *Ex parte Gifford* (1802), 6 Ves. 805; *Craythorne* v. *Swinburne, supra; Turner* v. *Davies* (1796), 2 Esp. 479; *Dunn* v. *Slee* (1817), 1 Moore (C. P.), 2; *Whiting* v. *Burke* (1871), 6 Ch. App. 342; *Ware* v. *Horwood* (1807), 14 Ves. 28, 31, 34; *Stirling* v. *Forrester* (1821), 3 Bli. 575, H. L.

(*k*) *Underhill* v. *Horwood, supra, per* Lord ELDON, L.C., at p. 226; and see *Re Gervais' Estate*, [1903] 1 I. R. 172.

(*l*) See *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, 765, P. C.

(*m*) *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; *Mayhew* v. *Crickett* (1818), 2 Swan. 185, 192; *Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424; *Swain* v. *Wall* (1641), 1 Rep. Ch. 80 [149]; *Craythorne* v. *Swinburne, supra, per* Lord ELDON, L.C., at pp. 167, 170; *Dallas* v. *Walls* (1874), 29 L. T. 599; *Ware* v. *Horwood, supra.*

(*n*) *Craythorne* v. *Swinburne, supra, per* Lord ELDON, L.C., at p. 165; *Whiting* v. *Burke, supra.*

(*o*) *Deering* v. *Winchelsea* (*Earl*), *supra; Ramskill* v. *Edwards* (1885), 31 Ch. D. 100, *per* PEARSON, J., at p. 110; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord BLACKBURN, at p. 19; *Stirling* v. *Forrester, supra,* at p. 590; *Craythorne* v. *Swinburne, supra; Shepheard* v. *Bray*, [1906] 2 Ch. 235, *per* WARRINGTON, J., at p. 253; *American Surety Co. of New York* v. *Wrightson* (1910), 103 L. T. 663.

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principal and surety, giving rise to contribution amongst co-sureties, the mere form of the instrument creating it will be disregarded (*p*).

When there is no right to contribution.

993. Where parties are not liable to a common demand there is no right of contribution between them (*q*), and there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it (*r*).

There is no right of contribution when sureties are bound by different instruments for equal portions of a debt due from the same principal debtor, the suretyship of each being a separate and distinct transaction (*s*), nor where it is expressly arranged by contract that each shall be individually answerable only for a given portion of one sum of money due from the principal debtor (*t*).

Where co-defendants are decreed to pay the costs of an action, one co-defendant cannot, by an independent proceeding, obtain contribution in respect of such costs against the other (*a*).

Exceptions to right of contribution.

994. There is, it seems, no right of contribution against a person who became co-surety with another person at the request of the latter (*b*), or on the promise and undertaking of the other co-surety

(*p*) *Reynolds* v. *Wheeler* (1861), 10 C. B. (N. S.) 561. In determining the character of a contract, its substance rather than its form and name will be considered (*Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793 (reversed, without affecting this point, *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135); *Shaw* v. *Royce*, *Ltd.*, [1911] 1 Ch. 138, *per* WARRINGTON, J., at p. 147), though the name by which the parties have called it will no tbe altogether disregarded (*Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.). See also p. 465, *ante*. In the case of a warrant of attorney executed by a principal and his sureties, should one of the sureties pay the debt secured thereby he is entitled to recover a proportional part from his co-surety, who cannot afterwards move to have the warrant set aside for defective execution (*Price* v. *Carter* (1845), 7 Q. B. 838; and see p. 532, *post*).

(*q*) *Hunter* v. *Hunt* (1845), 1 C. B. 300; *Johnson* v. *Wild* (1890), 44 Ch. D. 146. Where one guarantee policy covers one risk only, namely, defalcations by the employees, and another covers that and other risks also, it is doubtful whether the sureties under the latter policy are liable to contribution at the suit of the sureties under the former policy (*American Surety Co. of New York* v. *Wrightson* (1910), 103 L. T. 663).

(*r*) *Ruabon Steamship Co.* v. *London Assurance*, [1900] A. C. 6; and see *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.; *Sharpe* v. *Cummings* (1844), 2 Dow. & L. 504. So one tenant in common of a house who expends money on ordinary repairs, not being necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution (*Leigh* v. *Dickeson* (1883), 12 Q. B. D. 194). As to contribution between tortfeasors, see title TORT.

(*s*) *Coope* v. *Twyman* (1823), Turn. & R. 426; and see *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, P. C.

(*t*) *Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424. An agreement by co-sureties to share liability equally was held not to be binding because the settlement in consideration of which it was made could not be effected (*Arcedeckne* v. *Howard* (*Lord*) (1872), 27 L. T. 194, C. A.). Two out of three persons jointly and severally bound in a bond of indemnity to a sheriff, in a matter in which they are severally interested, cannot, after having paid the whole sum secured by the bond, join in an action against the third obligee for contribution (*Kelby* v. *Steel* (1805), 5 Esp. 194).

(*a*) *Dearsly* v. *Middleweek* (1881), 18 Ch. D. 236; *Real and Personal Advance Co.* v. *McCarthy* (1881), 18 Ch. D. 362, C. A.; but see *Newry Salt Works Co.* v. *Macdonnell*, [1903] 2 I. R. 454; and compare cases cited in note (*l*), p. 532, *post*.

(*b*) *Turner* v. *Davies* (1796), 2 Esp. 479 (which does not seem to be well

to indemnify him from all loss (*c*), where at least there are circumstances from which it can be inferred that, as between the two, one only was to be liable for the guaranteed debt; nor is there such right against a person who agreed to become surety on condition of another person signing as a co-surety when the condition has not been fulfilled (*d*); nor will the right be enforced where the surrounding circumstances and the language of the instrument under which several persons are bound indicate that there is a joint liability but no co-suretyship (*e*). A surety for a surety is not liable to contribution (*f*).

Where surety guilty of fraudulent concealment.

995. The right to contribution is not available where the person seeking to enforce it has been guilty of fraudulent concealment (*g*). One surety, however, is not under any larger obligation in this respect to his co-surety than the creditor is under to both of them (*h*).

SUB-SECT. 2.—*At what Time the Right arises.*

When right to contribution arises.

996. The right to contribution may arise either before or after the surety has fulfilled his guarantee (*i*), though in the former case there is very little authority to show the precise extent of the relief to which the surety is entitled (*k*). He can, however, before payment, by action against his co-sureties, compel them to contribute towards the liquidation of the common liability (*l*) In such action he can obtain a declaration of his own right to contribution, and, should the creditor be a party to the action, an order for the co-surety to pay to the latter a proportion of the guaranteed debt, and, should the creditor not be a party to such action, a prospective order directing the co-surety, upon payment by the surety of his

Relief before payment.

Form of order.

reported), where the surety seeking to enforce contribution had received security from the principal in respect of his suretyship liability. If this security had been given in pursuance of an arrangement that the surety should be thereby discharged, then certainly he would have no claim for contribution against his co-surety (*Done* v. *Walley* (1848), 2 Exch. 198).

(*c*) *Rae* v. *Rae* (1857), 6 I. Ch. R. 490. Parol evidence is admissible to prove the existence of such an indemnity (*ibid.*).

(*d*) *Barry* v. *Moroney* (1873), 8 I. R. C. L. 554, Ex. Ch.

(*e*) *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton, supra;* and see *Re Gervais' Estate,* [1903] 1 I. R. 172; title EQUITY, Vol. XIII., p. 30.

(*f*) *Craythorne* v. *Swinburne* (1807), 14 Ves. 160, where it was held that parol evidence was admissible to show whether, in truth, the defendant was a co-surety with the plaintiffs for the principal debtor, and as such bound to contribute, or was a surety for both the principal debtor and the plaintiffs, and therefore under no such liability; and see *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton,* [1904] 2 Ch. 178, C. A., and p. 465, *ante.*

(*g*) *Mackreth* v. *Walmesley* (1884), 51 L. T. 19, *per* KAY, J., at p. 30, who there states that if, as is well settled, a formal contract with the creditor may be avoided in certain cases of concealment by him of material facts from the surety, there can be no reason why the implied contract or the equity for contribution between the sureties should not in like manner be resisted.

(*h*) *Mackreth* v. *Walmesley, supra.*

(*i*) *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, C. A., *per* JAMES, L.J., at p. 47; *Wolmershausen* v. *Gullick,* [1893] 2 Ch. 514, 520.

(*k*) *Wolmershausen* v. *Gullick, supra, per* WRIGHT, J., at p. 520.

(*l*) *Ibid.* As to proceedings to enforce contribution, see p. 532, *post.*

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own share of the common liability, to indemnify the latter against further liability (*m*).

Relief after payment.

The right to contribution after payment does not arise until the surety has paid more than his proportion or share of the common liability, that is to say, more than he can ever be called upon to pay (*n*), and he cannot, therefore, sue his co-sureties for a rateable proportion of what he has paid the moment he has paid any part of the debt (*o*), though, apparently, where the guaranteed debt is payable by instalments, a surety who has paid the whole of one instalment is entitled to recover contribution from his co-surety in respect of such payment to the common creditor in relief of the co-sureties (*p*). There is also, apparently, a claim for contribution where one surety has made a payment to the creditor of a sum of money, not exceeding the surety's share of the guaranteed debt, if it has been accepted by such creditor in full satisfaction of the whole of the suretyship liability (*q*), for when so much of a guaranteed debt has been paid by a surety as to make it clear that, as between himself and his co-sureties, he has paid all that he can ever be called upon to pay, there is then, but not before, an equitable debt for contribution upon which even a bankruptcy petition can be founded (*r*).

Right of action after payment.

997. A surety who has paid his full share of the guaranteed debt has a right of action against his co-sureties as often as he pays anything further (*s*).

SUB-SECT. 3.—*Nature and Sufficiency of Payment entitling the Surety to Contribution.*

What amounts to payment of guaranteed debt.

998. The payment made by a surety under his guarantee is not treated as a payment made by him voluntarily (*t*), and he need not, in order to be entitled to recover contribution, show that he

(*m*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 520; and see *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401. Moreover, a surety for another, who holds an indemnity bond from a third person in respect of the suretyship liability, may, after he has been called upon to pay, but before payment, maintain an action against the executors of the third person for administration, payment of the guaranteed debt, and an indemnity (*Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410).

(*n*) *Ex parte Gifford* (1802), 6 Ves. 805; *Davies* v. *Humphreys* (1840), 6 M. & W. 153; *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, 47, C. A.; *Lever* v. *Pearce*, [1888] W. N. 105; *Gardner* v. *Brooke*, [1897] 2 I. R. 6, C. A.; but see *Re Macdonald, Ex parte Grant*, [1888] W. N. 130, C. A.

(*o*) *Davies* v. *Humphreys, supra, per* PARKE, B., at pp. 168, 169; and see *Ex parte Gifford, supra.*

(*p*) *Re Macdonald, Ex parte Grant, supra; Lawson* v. *Wright* (1786), 1 Cox, Eq. Cas. 275; *Lever* v. *Pearce, supra; Craythorne* v. *Swinburne* (1807), 14 Ves. 160; *Davies* v. *Humphreys, supra.*

(*q*) *Re Snowdon, Ex parte Snowdon, supra.*

(*r*) *Ibid., per* JAMES, L.J., at p. 47; and see *Lawson* v. *Wright, supra.*

(*s*) *Davies* v. *Humphreys, supra; Lawson* v. *Wright, supra.*

(*t*) *Pitt* v. *Purssord* (1841), 8 M. & W. 538; *Davies* v. *Humphreys, supra.* As to voluntary payments, in respect of which there is no contribution, see *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, 64, C. A.

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abstained from paying the creditor until compelled by the latter to pay (*a*).

The payment in respect of which contribution is claimed must, however, have been made by the surety in part at least out of his own money (*b*), or its equivalent (*c*).

When he pays with the assistance of a stranger, both will be treated as one person, and the claim for contribution will be allowed only after the surety has brought into account moneys received by the stranger in respect of securities for the guaranteed debt (*d*).

To whom payment should be made.

The surety should pay the money due from him as such to the person legally entitled to receive it (*e*). Otherwise such payment may not operate to relieve him from liability under his guarantee, nor entitle him to claim contribution (*f*).

SUB-SECT. 4.—*What is Recoverable by way of Contribution.*

Amount recoverable from each co-surety.

999. The amount recoverable from each co-surety is always regulated by the number of solvent sureties (*g*).

Where each surety is liable for an equal amount, all contribute equally towards the common debt, and if not equally liable, then proportionately to the amount for which each is liable (*h*).

(*a*) *Pitt* v. *Purssord* (1841), 8 M. & W. 538.

(*b*) *Geofel* v. *Swinden* (1844), 13 L. J. (Q. B.) 113; and see *Lucas* v. *Wilkinson* (1856), 1 H. & N. 420.

(*c*) See *Fahey* v. *Frawley* (1890), 26 L. R. Ir. 78, where the transfer by a surety of a mortgage security held by him, which was accepted by the creditor in discharge of the suretyship liability, was treated by the court as equivalent to a money payment. If a party gives a promissory note for the debt of another, which the creditor accepts in payment, it operates as a payment to the party's use, and may be received as such (*Barclay* v. *Proctor* (1797), 2 Esp. 571).

(*d*) *Re Arcedeckne, Atkins* v. *Arcedeckne* (1883), 24 Ch. D. 709.

(*e*) *Mann* v. *Stennett* (1845), 8 Beav. 189.

(*f*) As to what amounts to payment, see *Pattison* v. *Belford Union Guardians* (1856), 1 H. & N. 523, Ex. Ch.; *Stewart* v. *Aberdein* (1838), 4 M. & W. 211; *Kaye* v. *Brett* (1850), 5 Exch. 269; *Underwood* v. *Nicholls* (1855), 17 C. B. 239; *Bartlett* v. *Pentland* (1830), 10 B. & C. 760; *Howard* v. *Chapman* (1831), 4 C. & P. 508; *Todd* v. *Reid* (1821), 4 B. & Ald. 210; *Russell* v. *Bangley* (1821), 4 B. & Ald. 395.

(*g*) As already stated, see p. 527, *ante*. This equitable rule (as to which see *Peter* v. *Rich* (1629), 1 Rep. Ch. 19 [34]; *Primrose* v. *Bromley* (1739), 1 Atk. 89; *Simpson* v. *Vaughan* (1740), 2 Atk. 31; *Hitchman* v. *Stewart* (1855), 3 Drew. 271) did not formerly apply to the common law courts, though upheld in courts of equity; see note (*h*), pp. 526, 527, *ante*. It is, however, now recognised in all divisions of the High Court (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); see *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455, *per* LOPES, J., at p. 458; *Ramskill* v. *Edwards* (1885), 31 Ch. D. 100; *Re Fox, Walker & Co., Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.; *Buchanan* v. *Main* (1900), 3 F. (Ct. of Sess.) 215).

(*h*) *Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424, *per* ALDERSON, B., at p. 441; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; and see *Coope* v. *Twynam* (1823), Turn. & R. 426; *Collins* v. *Prosser* (1823), 1 B. & C. 682; *Re M'Donaghs* (1876), 10 I. R. Eq. 269. It is sometimes difficult to determine in what proportions the common liability shall be borne (*Re Ennis* (*Sir J. J.*), *Coles* v. *Peyton*, [1893] 3 Ch. 238); and see *American Surety Co. of New York* v. *Wrightson* (1910), 103 L. T. 663, where one guarantee policy was limited to one particular risk, while the other covered that and other risks also, and it was held that the contribution payable under the latter policy, if at all, must be based on actual liability and not on contingent obligations.

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Where sureties are bound by separate deeds and in unequal amounts, no one of them can be called upon to contribute beyond the sum for which he is liable under his own particular deed (*i*).

Interest.

Interest is recoverable by a surety on the sum due to him for contribution from the date when he paid the common creditor (*k*).

Costs.

1000. The costs of an action defended by a surety cannot, as a rule, be recovered by him as part of his claim for contribution, unless he was authorised by his co-sureties to defend (*l*), nor, apparently, unless it is established that in defending the action he adopted a prudent and reasonable course (*m*). However, costs incurred in proceedings by which the common creditor's claim was reduced may be included in ascertaining the amount of contribution payable by one co-surety to another co-surety (*n*).

For what credit must be given.

1001. When claiming contribution the surety must give credit for all that he has received from the principal debtor or by means of a counter-security given by way of indemnity (*o*).

SUB-SECT. 5.—*Enforcement of Contribution.*

Enforcement of contribution.

1002. An action for the recovery of contribution (*p*) may be brought in the High Court or in the county court, according to the amount claimed (*q*).

Form of action.

The form of the action is for money paid to the use of the co-surety sued, unless there is a covenant for payment, in which case the action should be brought thereon (*r*).

An action for money paid, however, is not available unless the

(*i*) See *Craythorne* v. *Swinburne* (1807), 14 Ves. 160; *Deering* v. *Winchelsea* (*Earl*) (1800), 2 Bos. & P. 270.

(*k*) *Hitchman* v. *Stewart* (1855), 3 Drew. 271; *Swain* v. *Wall* (1641), 1 Rep. Ch. 80 [149]; *Lawson* v. *Wright* (1786), 1 Cox, Eq. Cas. 275, 277; *Petre* v. *Duncombe* (1851), 2 L. M. & P. 107; and see *Re Hunt* (*Sir F. S.*), *Harvey's Claim* (1902), 86 L. T. 504; *Re Swan's Estate* (1869), 4 I. R. Eq. 209. Formerly interest was not, apparently, recoverable by a surety claiming contribution (*Onge* v. *Truelock* (1828), Moll. 31, 44; *Salkeld* v. *Abbott* (1832), Hayes & Jo. 110; *Bell* v. *Free* (1818), 1 Swan. 90).

(*l*) *Knight* v. *Hughes* (1828), 3 C. & P. 467; *Roach* v. *Thompson* (1828), Mood. & M. 487; *Blyth* v. *Smith* (1843), 5 Man. & G. 405; *Tindall* v. *Bell* (1843), 11 M. & W. 228. As to when costs are recoverable by a person claiming indemnity against another, see generally, p. 486, *ante*.

(*m*) *Tindall* v. *Bell*, *supra*; *Broom* v. *Hall* (1859), 7 C. B. (N. S.) 503.

(*n*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514. Moreover, where two persons have executed, as sureties, a warrant of attorney, given as a collateral security for a sum of money advanced on mortgage to the principal debtor, and on default being made by the latter judgment is entered up on the warrant of attorney and execution issued against one of the sureties, he can recover from his co-surety a moiety of the costs of such execution (*Kemp* v. *Finden* (1844), 12 M. & W. 421; and see p. 528, *ante*). Warrants of attorney are seldom now given with mortgages.

(*o*) *Knight* v. *Hughes* (1828), Mood. & M. 247; *Steel* v. *Dixon* (1881), 17 Ch. D. 825; *Re Arcedeckne*, *Atkins* v. *Arcedeckne* (1883), 24 Ch. D. 709; and see *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; *Berridge* v. *Berridge* (1890), 44 Ch. D. 168.

(*p*) As to the time within which the action must be brought, see title LIMITATION OF ACTIONS; and as to a surety's right against an insolvent co-surety, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 41, 205.

(*q*) As to the jurisdiction of the county court, see title COUNTY COURTS, Vol. VIII., pp. 428 *et seq.*

(*r*) *Crafts* v. *Tritton* (1818), 2 Moore (C. P.), 411; compare p. 525 as to proceedings for indemnification.

plaintiff has actually paid money or its equivalent (*s*) and the proportion of contribution recoverable has been ascertained (*t*). Particulars of demand are, moreover, required from a surety claiming from a co-surety payment of a definite sum by way of contribution, and not merely an account (*a*).

Though in all courts the amount of contribution recoverable from each one of several sureties is regulated, in accordance with the equitable rule (*b*) now prevailing (*b*), by the number of solvent sureties, it is even now sometimes more convenient to sue for contribution in the Chancery Division of the High Court rather than in the King's Bench Division thereof (*c*).

Parties to actions.

1003. In an action for contribution the principal debtor and the co-sureties or their personal representatives should, although they may have become insolvent, be made parties (*d*), unless the fact of their insolvency is clearly proved or admitted, and even in such case the plaintiff has, apparently, the right to elect whether he will not bring the insolvent co-obligor or his representative before the court (*e*).

Representatives of deceased surety.

In case of the death of a co-surety his representatives are liable, both legally and equitably, to contribute, to the extent of his assets, what was due from him under his guarantee (*f*).

Third party notice.

1004. A surety against whom an action has been brought upon his guarantee may, without waiting to bring an action for contribution later on, at once assert his right thereto by means of a third party notice (*g*) claiming contribution against his co-surety (*h*).

(*s*) See p. 529, *ante*, where also the right to contribution before payment is discussed.

(*t*) *Sharpe* v. *Cummings* (1844), 2 Dow. & L. 504; *Bates* v. *Townley* (1848), 2 Exch. 152. In both these cases the right of contribution was disputed.

(*a*) *Blackie* v. *Osmaston* (1884), 28 Ch. D. 119, C. A.

(*b*) See note (*h*), pp. 526, 527, and note (*g*), p. 531, *ante*.

(*c*) *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C. As regards the evidence in an action for recovery of contribution, an indorsement by the payee of a joint and several promissory note given by three persons, and made by him on such note, stating that a certain specified sum had been received by the payee from one of the drawers (naming him) on account of such note, and that the sum for which such note was given had been originally advanced to one of the drawers (naming him), is admissible in evidence, in an action by the drawer (from whom the payee admitted he had received payment) to recover contribution from his co-surety and co-drawer, to prove, not only the payment to the payee, but also to establish which of the three drawers was the principal debtor (*Davies* v. *Humphreys* (1840), 6 M. & W. 153).

(*d*) Where the principal debtor is a party to the action his insolvency need not be proved (*Cowell* v. *Edwards* (1800), 2 Bos. & P. 268; *Lawson* v. *Wright* (1786), 1 Cox, Eq. Cas. 275), though, possibly, such proof may be required where he is not a party to the action (*ibid.*).

(*e*) Daniell's Chancery Practice, 6th ed., Vol. I., p. 252; and see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Hole* v. *Harrison* (1673), Cas. *temp.* Finch, 15. As to a surety being entitled to obtain, before payment of anything under his guarantee, a declaration of his right to contribution, see p. 529, *ante*.

(*f*) *Primrose* v. *Bromley* (1739), 1 Atk. 89; *Simpson* v. *Vaughan* (1740), 2 Atk. 31; *Batard* v. *Hawes* (1853), 2 E. & B. 287; and see *Ashby* v. *Ashby* (1827), 7 B. & C. 444, *per* BAYLEY, J., at p. 449.

(*g*) As to third party procedure, see title PRACTICE AND PROCEDURE.

(*h*) For form of third party notice by a surety claiming contribution against

SECT. 1. The Right to Contribution.

When thus made a third party, the co-surety should not appear separately, and by different counsel, if he has no reason to suppose that the defendant surety will not fight the action to the uttermost (*i*).

Defences available to co-surety.

1005. The defences which one co-surety has against another when sued for contribution are no more and no less than the defences one principal may have against another principal (*k*).

SUB-SECT. 6.—*Loss of Right to enforce Contribution.*

Effect of giving time.

1006. The right to recover contribution from a co-surety is not lost nor affected by the circumstance that the creditor has given time to the surety seeking to enforce contribution (*l*).

Whether an agreement by a surety to give time to the principal debtor discharges a co-surety is still, apparently, doubtful (*m*).

Effect of release of co-surety.

It is also doubtful whether the release of one co-surety by another discharges the remaining sureties from such proportion of the common debt as they would (but for such release) have been entitled to recover from the surety released (*n*). Where, however, one of two sureties who holds an indemnity from a third person in respect of the suretyship liability discharges the other surety from his liability to pay contribution, he, *pro tanto*, relieves such third person from liability to indemnify (*o*).

SECT. 2.—*Rights in respect of Securities held by the Creditor or a Co-surety.*

Right of surety to securities.

1007. A surety who has made payment of more than his due proportion of the common liability is entitled to have assigned to him all the creditor's rights and securities, whether satisfied or not,

a co-surety, see R. S. C., Appendix B, Form No. 1. This form is by R. S. C., Ord. 16, r. 48, made to apply to co-defendants one of whom claims contribution or indemnity against the other (*English and Scottish Trust Co.* v. *Flateau* (1887), 36 W. R. 238). In giving leave to issue a third party notice, the court will not consider whether the claim is a valid one, but whether the claim is *bonâ fide*, and, if established, will result in contribution or indemnity (*Carshore* v. *North Eastern Rail. Co.* (1885), 29 Ch. D. 344, C. A.); see also title PRACTICE AND PROCEDURE.

(*i*) *Williams* v. *Buchanan* (1891), 7 T. L. R. 226, C. A.

(*k*) *Greenwood* v. *Francis*, [1899] 1 Q. B. 312, C. A., *per* A. L. SMITH, L.J., at p. 320; and see *Vorley* v. *Barrett* (1856), 1 C. B. (N. S.) 225.

(*l*) *Dunn* v. *Slee* (1817), 1 Moore (C. P.), 2.

(*m*) *Greenwood* v. *Francis*, *supra*; and see *Vorley* v. *Barrett*, *supra*: this is so notwithstanding a *dictum* that where two persons are sureties for the performance of an act by a third person on a given day, if time be given by one surety to the principal without the consent of the other the latter is discharged from liability (*Way* v. *Hearn* (1862), 11 C. B. (N. S.) 774, *per* ERLE, C.J., at p. 782; and see *Re Gervais' Estate*, [1903] 1 I. R. 172; *Hodgson* v. *Hodgson* (1837), 2 Keen, 704).

(*n*) It is submitted that such a release should have the effect stated in the text. According to an American decision, the release of one surety by another discharges the other sureties (*Fletcher* v. *Grover* (1840), 11 New Hampshire Reports, 368). As regards the effect of the release of one of several sureties by the creditor, see p. 569, *post*; *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, P. C.

(*o*) *Hodgson* v. *Hodgson*, *supra*; and see *Way* v. *Hearn*, *supra*; *Re Gervais' Estate*, *supra*.

SECT. 2. Rights in respect of Securities etc.

for the purpose of obtaining contribution (*p*), including, apparently, securities received by the creditor from co-sureties where the suretyships are contemporaneous and relate to the same transaction (*q*), and he may therefore recover contribution by means of such securities (*r*). He is likewise entitled to the benefit of all securities which have been taken by any other co-surety to indemnify himself against the common liability (*s*), and also of a judgment obtained by the creditor against the principal debtor and his sureties, whether such judgment has been actually assigned or not (*t*).

Hotchpot of counter-security.

1008. A co-surety must bring into hotchpot whatever he receives from any counter-security obtained by him from the principal debtor, even though he consented to become a surety only on condition of receiving such counter-security, and although the co-sureties were ignorant of this when they themselves became sureties (*a*).

When by means of a counter-security the surety has been repaid what he has paid on account of the guaranteed debt, and has shared the amount thus received by him with his co-sureties, he will again be entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on until the whole of the payments made by the co-sureties on account of the guaranteed debt have been refunded or the value of the counter-security has been exhausted (*b*).

Part IX.—The Discharge of the Surety and the Determination of the Guarantee.

SECT. 1.—*Fulfilment of the Purpose of the Guarantee.*

SUB-SECT. 1.—*By the Principal Debtor.*

Discharge of surety by payment.

1009. Payment made by the principal debtor of the guaranteed debt will effectually discharge the surety (*c*). To have this effect,

(*p*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord BLACKBURN, at p. 19. If several persons are indebted and one makes the payment, the creditor is bound in conscience (if not by contract) to give the party paying the debt all his remedies against the other debtors (*Stirling* v. *Forrester* (1821), 3 Bli. 575, H. L., *per* Lord REDESDALE, at p. 590).

(*q*) *Duncan, Fox & Co.* v. *North and South Wales Bank, supra*, reversing, without dissent on this point, *Duncan, Fox & Co.* v. *North and South Wales Bank* (1879), 11 Ch. D. 88, C. A., *per* JESSEL, M.R., at p. 96.

(*r*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; *Re Parker, Morgan* v. *Hill*, [1894] 3 Ch. 400, C. A.; *Ex parte Crisp* (1744), 1 Atk. 133, 135; *Aldrich* v. *Cooper* (1803), 8 Ves. 382, *per* Lord ELDON, L.C., at p. 389.

(*s*) *Done* v. *Walley* (1848), 2 Exch. 198; *Re Albert Life Assurance Co., Ex parte Western Life Assurance Society* (1870), L. R. 11 Eq. 164, 177; *Re Parker, Morgan* v. *Hill, supra; Re Clark, Ex parte Stokes* (1848), De G. 618, 621; Story, s. 499.

(*t*) *Re M'Myn, Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575.

(*a*) *Steel* v. *Dixon* (1881), 17 Ch. D. 825; and see *Re Arcedeckne, Atkins* v. *Arcedeckne* (1883), 24 Ch. D. 709; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75.

(*b*) *Berridge* v. *Berridge* (1890), 44 Ch. D. 168.

(*c*) *Re Parrett, Ex parte Whittaker* (1891), 39 W. R. 400. Circumstances may

SECT. 1. **Fulfilment of the Purpose of the Guarantee.**

however, the payment must not amount to a fraudulent preference (*d*), but must be a valid payment. Where a creditor accepts payment from the principal debtor in country notes of a bank which afterwards stops payment, instead of insisting on the right to be paid in legal tender (*e*), or where he accepts a promissory note which, on the face of it, constitutes a discharge in full of the guaranteed debt (*f*), this is a good payment discharging the surety from his guarantee. On the other hand, the mere fact of there being a balance, equal in amount to the guaranteed debt, due and owing from the creditor to the principal debtor in respect of other transactions outside the scope of the guarantee will not operate as a payment so as to discharge the surety (*g*). Whether the guaranteed debt be liquidated by the principal debtor voluntarily (*h*) or under compulsion, the surety is discharged to the extent of the sum received by the creditor from the principal debtor (*i*).

Right to appropriate.

The mere existence of a suretyship does not, in the absence of express contract (*k*), take away from the principal debtor and creditor those powers which they would otherwise possess of appropriating payment (*l*). Thus, the principal debtor, where he is indebted to the creditor on two or more accounts, to one of which only the guarantee applies, is at liberty to appropriate a payment made by him to any of the accounts (*m*). Where, therefore, there is evidence of an intention that payments made by a principal

(i.) The debtor's right.

exist to prevent a payment by the principal debtor of the entire guaranteed debt operating to discharge the surety (*Re O'Callaghan* (1837), 1 I. Eq. R. 448, n.).

(*d*) *Petty* v. *Cooke* (1871), L. R. 6 Q. B. 790; *Pritchard* v. *Hitchcock* (1843), 6 Man. & G. 151. As to what constitutes a fraudulent preference, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 279 *et seq.*

(*e*) *Lichfield Union Guardians* v. *Greene* (1857), 1 H. & N. 884.

(*f*) *M'Clure* v. *Fraser* (1840), 9 L. J. (Q. B.) 60. He cannot afterwards prove by parol evidence that it is not intended to operate as a discharge in full (*ibid.*).

(*g*) *Harrison* v. *Nettleship* (1833), 2 My. & K. 423; but see *Ex parte Hanson* (1806), 12 Ves. 346.

(*h*) The surety is also entitled to the benefit of payments voluntarily made by an agent of the principal debtor on account of an annuity the regular payment of which the surety has guaranteed (*Williamson* v. *Goold* (1823), 1 Bing. 171). Whether a payment made is accepted in full satisfaction of an indemnity or other liability sometimes turns on the form of receipt given (*Field* v. *Robins* (1838), 8 Ad. & El. 90).

(*i*) *Pearl* v. *Deacon* (1857), 24 Beav. 186, where, the creditor having distrained in respect of the guaranteed debt upon goods mortgaged to the surety by the principal debtor, it was held that the surety's liability was discharged to the extent of the sum produced by such distress; see also *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139; *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, 603, P. C.

(*k*) *Commercial Bank of Australia* v. *Wilson & Co.'s Estate* (*Official Assignee*), [1893] A. C. 181, P. C.; *Edwards* v. *Hood-Barrs*, [1905] 1 Ch. 20; *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch. D. 692, C. A.; *Williams* v. *Rawlinson* (1825), 3 Bing. 71; see, generally, titles CONTRACT, Vol. VII., pp. 449 *et seq.*; MONEY AND MONEY-LENDING. As to appropriation by the surety, see p. 538, *post*.

(*l*) *Re Mayor, Ex parte Whitworth* (1841), 2 Mont. D. & De G. 164; *A.-G. of Jamaica* v. *Manderson* (1848), 12 Jur. 383, P. C.; *Re Sherry, London and County Banking Co.* v. *Terry, supra*; *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18; *Williams* v. *Rawlinson, supra*; *Hollond* v. *Teed* (1848), 7 Hare, 50; see also title BANKERS AND BANKING, Vol. I., p. 586.

(*m*) See *Kinnaird* v. *Webster, supra*; *Pearl* v. *Deacon, supra*.

SECT. 1. Fulfilment of the Purpose of the Guarantee.

(ii.) The creditor's right.

debtor shall be applied in relief of the surety's liability, they will be so applied (*n*), but not otherwise (*o*).

If the principal debtor make no appropriation the creditor may then, in general, do so (*p*), where, at least, there are distinct accounts current (*q*), and a general payment, but not where the accounts are blended and treated as one entire account by all parties (*r*). Where at the date of the guarantee the debtor is already indebted, upon an existing account, to the guaranteed creditor, and that pre-existing debt is not mentioned in the contract of suretyship, the creditor may appropriate to such debt subsequent payments made by the debtor, whether the surety knew of such pre-existing debt or not when he became bound, and the creditor need not apply them in reduction of the guaranteed debt (*s*). On the other hand, where it is evident that a surety for advances by bankers to their customer is only to be liable if enough money is not paid in by the latter to his account, then all subsequent payments from time to time made by the customer must be appropriated to the guaranteed debt (*a*). In the case of a guarantee given to bankers, having knowledge at the time of an act of bankruptcy committed by their customer, to cover to a limited amount all sums then or thereafter to become due from such customer, money subsequently paid by a surety ignorant of the act of bankruptcy, equal to the maximum of his liability, without making any specific appropriation thereof, must, nevertheless, be applied to the reduction of that portion of the guaranteed debt which is provable, and not to that portion which is not provable (*b*).

(*n*) *Marryatts* v. *White* (1817), 2 Stark. 101; *Re Booth, Browning* v. *Baldwin* (1879), 27 W. R. 644; *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139; *Field* v. *Carr* (1828), 5 Bing. 13; *Toulmin* v. *Copland* (1836), 3 Y. & C. (EX.) 625; *Copland* v. *Toulmin* (1840), 7 Cl. & Fin. 349, H. L.; *Bank of Scotland* v. *Christie* (1841), 8 Cl. & Fin. 214, H. L.; *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. 692; *Young* v. *English* (1843), 7 Beav. 10.

(*o*) *Plomer* v. *Long* (1816), 1 Stark. 153, 154, n. (a); *Williams* v. *Rawlinson* (1825), 3 Bing. 71; *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18; *Wright* v. *Hickling* (1866), L. R. 2 C. P. 199; *York City and County Banking Co.* v. *Bainbridge* (1880), 43 L. T. 732; *Browning* v. *Baldwin* (1879), 40 L. T. 248; *Henniker* v. *Wigg* (1843), 4 Q. B. 792, followed in *City Discount Co.* v. *McLean, supra.*

(*p*) *City Discount Co.* v. *McLean, supra, per* BLACKBURN, J., at p. 700; *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139, *per* BACON, V.-C., at p. 145; and see *Simson* v. *Ingham* (1823), 2 B. & C. 65; *Mills* v. *Fowkes* (1839), 5 Bing. (N. C.) 455.

(*q*) The law as to appropriation of payments applies to an account current only (*Hay & Co.* v. *Torbet*, [1908] S. C. 781; and see title CONTRACT, Vol. VII., p. 449).

(*r*) *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39, *per* BAYLEY, J., at p. 45; *City Discount Co.* v. *McLean, supra.* As to a banker's right to appropriate, see *Simson* v. *Ingham* (1823), 2 B. & C. 65; and title BANKERS AND BANKING, Vol. I., pp. 639 *et seq.*

(*s*) *Kirby* v. *Marlborough* (*Duke*), *supra; Williams* v. *Rawlinson, supra.* It has been held in America that where credit is extended after a limited guarantee has expired all unappropriated payments must thereafter be applied by the creditor to the secured indebtedness (*Phipps* v. *Willis* (1895), 32 South Western Reporter, 801; and see *Shaw* v. *Picton* (1825), 7 Dow. & Ry. (K. B.) 201).

(*a*) *Kinnaird* v. *Webster, supra; Browning* v. *Baldwin* (1879), 40 L. T. 248, *per* BACON, V.-C., at p. 249.

(*b*) *Re Mason, Ex parte Sharp* (1844), 3 Mont. D. & De G. 490.

SECT. 1. Fulfilment of the Purpose of the Guarantee.

Appropriation when a debt is payable by instalments.

1010. The surety for a debt payable by instalments is not entitled, on the bankruptcy of the principal debtor, by virtue of the doctrine of appropriation of payments, to have the dividend received by the creditor in respect of the whole debt applied in discharge of one instalment thereof, as such dividend must be applied rateably in part payment of each instalment as it becomes due (*c*). Though in the case of appropriation of payments interest is presumed to be paid before capital, this rule does not apply to the case of interest on an overdrawn account, which, according to the practice of bankers, has been from time to time converted into principal (*d*).

Appropriation by law.

Where neither debtor nor creditor exercise the option to appropriate payments, the law then appropriates them to the earlier debt or item of debit (*e*), unless evidence of a contrary intention be forthcoming (*f*).

Set-off between creditor and principal debtor.

1011. When the payment of the guaranteed debt by the principal debtor is accomplished by means of a set-off consisting of some debt due to the principal debtor from the creditor, the surety may avail himself of such set-off in any court in which he is sued for the guaranteed debt (*g*).

SUB-SECT. 2.—*By the Surety.*

Payment by the surety.

1012. Payment by the surety of the guaranteed debt to the creditor discharges the surety (*h*).

Where the surety is indebted to the creditor in respect of some account outside the guarantee, he should, on making a payment, specifically appropriate it, if such be his intention, to the discharge of his suretyship liability, and require the guarantee to be given up to him and not leave it doubtful to which account his payment is applicable (*i*).

(*c*) *Martin* v. *Brecknell* (1813), 2 M. & S. 39.

(*d*) *Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A., where the guarantee was given to bankers in respect of a customer's account.

(*e*) *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139, *per* BACON, V.-C., at pp. 144, 145; *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39; *Henniker* v. *Wigg* (1843), 4 Q. B. 792.

(*f*) *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. 692; *Re Booth, Browning* v. *Baldwin* (1879), 27 W. R. 644. Where an agent delivers an account, in which he charges himself with a balance, and he continues to receive money for his principal, his subsequent payments are not necessarily to be first applied to the extinction of the previous balance when the subsequent receipts are equal to the subsequent payments (*Lysaght* v. *Walker* (1831), 5 Bli. (N. S.) 1).

(*g*) *Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372; *Bowyear* v. *Pawson* (1881), 6 Q. B. D. 540; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24; and see *Ex parte Hanson* (1806), 12 Ves. 346, where against a joint bond debt of a principal and surety to a firm the principal debtor was allowed to set off a sum due to him alone from the firm and prove for the balance on the bankruptcy of the latter; see also p. 508, *ante*.

(*h*) As to what constitutes payment by a surety, see pp. 521, 530, *ante*, and as to the person to whom payment should be made, see p. 531, *ante*.

(*i*) *Waugh* v. *Wren* (1862), 11 W. R. 244; *Commercial Bank of Australia* v. *Wilson & Co.'s Estate* (*Official Assignee*), [1893] A. C. 181, P. C. As to appropriation by the principal and creditor, see pp. 536, 537, *ante*.

SECT. 2.—*Avoidance of the Guarantee.*

SECT. 2. Avoidance of the Guarantee.

SUB-SECT. 1—*Fraudulent Concealment and Misrepresentation.*

Antecedent fraud classified.

1013. Fraud antecedent to the execution of the guarantee may consist of suppression or concealment of the truth, or of the assertion of that which is false, namely, of misrepresentation (*k*).

Where the surety seeks to avoid liability on the ground of fraud, it is not sufficient for him to show that fraud was practised on him by the principal debtor, but it must be proved that the creditor, or his agent, was aware of such fraud and a party thereto (*l*).

Contract of guarantee not *uberrimæ fidei*.

1014. In dealing with fraud antecedent to a contract of guarantee it should be borne in mind that this contract is not one requiring the exercise of *uberrima fides* (*m*) by the contracting parties (*n*), but that it must, nevertheless, be based upon the free and voluntary agency of the individual who enters into it (*o*).

Moreover, it is a contract *strictissimi juris* in this sense, that the surety cannot be made liable thereunder unless the terms thereof are strictly complied with (*p*).

Unless of the nature of insurance.

Where the contract of suretyship may with equal propriety be called either a contract of insurance or of guarantee, it is apparently a contract in which *uberrima fides* is required (*q*).

Fraudulent concealment.

1015. A guarantee is apparently invalidated only when there has been a fraudulent concealment of material facts which should

(*k*) *Willis* v. *Willis* (1850), 17 Sim. 218; *Stone* v. *Compton* (1838), 5 Bing. (N. C.) 142; *North British Insurance Co.* v. *Lloyd* (1854), 10 Exch. 523; *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934, H. L.; *Hamilton* v. *Watson* (1845), 12 Cl. & Fin. 109, H. L. As to the effect of fraud or concealment after the execution of the guarantee, see p. 487, *ante*, and pp. 558 *et seq.*, *post*. As to misrepresentation, actual or constructive, generally, see title MISREPRESENTATION AND FRAUD.

(*l*) *Spencer* v *Handley* (1842), 4 Man. & G. 414; *Matthews* v. *Bloxsome* (1864), 12 W. R. 795; and see *Greenfield* v. *Edwards* (1865), 2 De G. J. & Sm. 582, C. A.; *Mactaggart* v. *Watson* (1835), 3 Cl. & Fin. 525, 542, 543, H. L.; *Jackman* v. *Mitchell* (1807), 13 Ves. 581. As to fraud on the creditor, see p. 501, *ante*.

(*m*) It was formerly held that a guarantee, equally with a contract of insurance, was one *uberrimæ fidei* (*Owen* v. *Homan* (1851), 3 Mac. & G. 378, 397; *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793 (reversed, without affecting this point, *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135). See also pp. 479, 480, *ante*.

(*n*) *North British Insurance Co.* v. *Lloyd*, *supra*; *Wythes* v. *Labouchere* (1859), 3 De G. & J. 593; *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, *per* FRY, J., at p. 475; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482; *Seaton* v. *Heath*, *Seaton* v. *Burnand*, *supra*, *per* ROMER, L.J., at p. 793; *Blackburn*, *Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531; *Williams* v. *Rawlinson* (1825), 3 Bing. 71, *per* BEST, C.J., at p. 77.

(*o*) *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200, *per* Lord WESTBURY, at p. 219.

(*p*) *Bacon* v. *Chesney* (1816), 1 Stark. 192, *per* Lord ELLENBOROUGH, C.J., at p. 193.

(*q*) *Seaton* v. *Heath*, *Seaton* v. *Burnand*, *supra*, *per* ROMER, L.J., at pp. 792, 793 (see *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 188). In determining the category to which a particular contract belongs, the substance thereof must be regarded, there being no magic in the use of such words as "insurance" or "guarantee" (*Seaton* v. *Heath*, *Seaton* v. *Burnand*, *supra*, *per* ROMER, L.J., at p. 793; see also *Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138, *per* WARRINGTON, J., at p. 147; *Reynolds* v. *Wheeler* (1861), 10 C. B. (N. S.) 561, *per* WILLIAMS, J., at p. 566, and p. 465, *ante*).

SECT. 2. Avoidance of the Guarantee.

have been disclosed (*r*), though it is not necessary that such concealment should, in order to have such effect, have been intended to benefit the person guilty of it (*s*).

Requisites of fraudulent concealment.

1016. Fraudulent concealment may consist not merely of the omission to disclose such facts as need be mentioned only in answer to the surety's questions, but also of the non-disclosure of facts (*t*) which the creditor must spontaneously disclose to him, and the criterion whether such disclosure should be made is whether there is anything which might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect (*a*). It depends on the nature of the transaction in each case whether the fact not disclosed is such that it is impliedly represented not to exist (*b*). Thus, where an estate is conveyed to a person "free from incumbrances," except such as are set forth in a particular schedule, in consideration of such person and his surety doing certain things, and afterwards it is discovered that the estate is subject to another incumbrance unknown to the surety and forgotten by the party making the conveyance, the surety will not be liable (*c*). There is, however, no universal obligation on the part of the creditor to make disclosure of facts to the surety (*d*). If the intending surety is unacquainted with the risk he is undertaking, he should make inquiry on the subject (*e*), the creditor being under no obligation to inform him of matters affecting the debtor's credit, or of any circumstances unconnected with the transaction in which he is about to engage, rendering his position more hazardous (*f*). However, very little said which ought not to have been said and very little left unsaid which ought to have been said will suffice to avoid a contract of suretyship (*g*), and if the creditor has made a statement which he

Duty of creditor.

(*r*) *North British Insurance Co.* v. *Lloyd* (1854), 10 Exch. 523; and see *Pledge* v. *Buss* (1860), John. 663; *Burke* v. *Rogerson* (1866), 14 L. T. 780, C. A.

(*s*) *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934, H. L.; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, *per* SHEE, J., at pp. 499, 500; and see *North British Insurance Co.* v. *Lloyd*, *supra*; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666; *Durham Corporation* v. *Fowler* (1889), 22 Q. B. D. 394; *Caxton and Arrington Union* v. *Dew* (1899), 68 L. J. (Q. B.) 380.

(*t*) *Phillips* v. *Foxall*, *supra*; *Lee* v. *Jones*, *supra*; *Smith* v. *Bank of Scotland* (1813), 1 Dow, 272, H. L., *per* Lord ELDON, L.C., at p. 292.

(*a*) *Hamilton* v. *Watson* (1845), 12 Cl. & Fin. 109, H. L., *per* Lord CAMPBELL, at p. 119; and see the cases cited at pp. 541 *et seq.*, *post*.

(*b*) *Lee* v. *Jones*, *supra*, *per* BLACKBURN, J., at p. 506.

(*c*) *Willis* v. *Willis* (1850), 17 Sim. 218; and see *Blest* v. *Brown* (1862), 8 Jur. (N. S.) 602.

(*d*) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, *per* FRY, J., at pp. 474, 475.

(*e*) *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A., *per* ROMER, L.J., at p. 793; reversed, without affecting this point, [1900] A. C. 135.

(*f*) *Wythes* v. *Labouchere* (1859), 3 De G. & J. 593, *per* Lord CHELMSFORD, L.C., at p. 609; and see *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135; *Welton* v. *Somes* (1888), 5 T. L. R. 46; *Davies* v. *London and Provincial Marine Insurance Co.*, *supra*.

(*g*) *Davies* v. *London and Provincial Marine Insurance Co.*, *supra*.

believes to be true, but which, in the course of the negotiations, he discovers to be false, he should correct it (*h*). Thus, the surety should be informed of every private bargain between the creditor and the principal debtor varying the degree of the surety's responsibility (*i*), and it may sometimes become necessary even to disclose the existence and nature of an agreement between the creditor and some person other than the principal debtor (*k*).

Inquiry by creditor into circumstances of guarantee.

1017. Though a creditor is not bound in every case to inquire into the facts under which a third person becomes surety to him for another, he must do so when the circumstances of the case or the dealings between the parties are such as to suggest the existence of fraud (*l*), or where a fiduciary relation subsists between the principal debtor and the surety (*m*). He must apparently also inquire when the intending surety is the wife of the principal debtor (*n*), though there is no general rule of universal application that the rule of equity as to confidential relations necessarily applies to the relation of husband and wife, so as to throw on the husband or on the person who is suing the wife the onus of disproving an allegation of undue influence (*o*).

Concealment of indebtedness of principal debtor.

1018. In the case of a suretyship for a customer requiring and applying to his bankers for cash credit, the omission to disclose spontaneously to the intending sureties the actual state of the customer's account will not necessarily vitiate the guarantee (*p*). As it is not a matter of presumption that a customer's account stands clear at the time the guarantee is given, the surety should

(*h*) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469.

(*i*) *Pidcock* v. *Bishop* (1825), 3 B. & C. 605; *Re Mason, Ex parte Sharp* (1844), 3 Mont. D. & De G. 490; *Stone* v. *Compton* (1838), 5 Bing. (N. C.) 142, 157; *Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424; *Smith* v. *Bank of Scotland* (1813), 1 Dow, 272, H. L., *per* Lord ELDON, L.C., at pp. 292 *et seq.*; *Burke* v. *Rogerson* (1866), 14 L. T. 780, C. A.; *Hamilton* v. *Watson* (1845), 12 Cl. & Fin. 109, H. L.; *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934, H. L.; *Mackreth* v. *Walmesley* (1884), 51 L. T. 19.

(*k*) *Stiff* v. *Eastbourne Local Board* (1868), 19 L. T. 408. In the case of a surety for payment of part of the purchase-money of ships, mortgaged to the vendor for the balance, the fact that one of the ships is laden with munitions of war destined for a belligerent port should be disclosed to the surety or he will be discharged (*Burke* v. *Rogerson, supra*).

(*l*) *Owen and Gutch* v. *Homan* (1853), 4 H. L. Cas. 997.

(*m*) See p. 450, *ante*, and for examples of relations giving rise to the presumption of undue influence, see titles CONTRACT, Vol. VII., p. 357; FRAUDULENT AND VOIDABLE CONVEYANCES, pp. 107 *et seq.*, *ante*.

(*n*) See p. 450, *ante*. See also *Howes* v. *Bishop*, [1909] 2 K. B. 390, C. A.; and as to transactions between husband and wife in general, see title HUSBAND AND WIFE.

(*o*) *Howes* v. *Bishop, supra*, approving *Barron* v. *Willis*, [1899] 2 Ch. 578; *Bank of Africa* v. *Cohen* (1909), 25 T. L. R. 285; *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377; *Field* v. *Sowle* (1827), 4 Russ. 112; and compare *Parfitt* v. *Lawless* (1872), L. R. 2 P. & D. 462, *per* Lord PENZANCE, at p. 468; *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, P. C.; *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188 (but compare *Howes* v. *Bishop, supra, per* Lord ALVERSTONE, C.J., at p. 397); *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, C. A.; *Talbot* v. *von Boris* (1910), 27 T. L. R. 95; *Bank of Montreal* v. *Stuart*, [1911] A. C. 120, P. C.; and title HUSBAND AND WIFE.

(*p*) *Hamilton* v. *Watson, supra*, where neither fraud nor fraudulent concealment were charged; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, *per* SHEE, J., at p. 501; *Welton* v. *Somes* (1888), 5 T. L. R. 46; *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18, 22; *Wilson* v. *Craven* (1841), 8 M. & W. 584; and see also *Roper* v. *Cox* (1882), 10 L. R. Ir. 200.

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make inquiry on the subject (*q*). Moreover, where a bond is given for the continuance of an old banking account the surety will not be discharged by the non-disclosure of the fact of the principal debtor's having a balance against him duly secured at the date of the bond, as it is well known that such accounts are not carried on till the old balance has been secured (*r*). Again, a surety for the discharge by a relieving officer of his official duties need not be informed that at the date of the suretyship bond a considerable sum of money is due from such officer in respect of money received by him in his official capacity, as it is common knowledge that from the very nature of his office he must be sure to have money in hand (*s*). So, where a guarantee is given for the payment of rent, the surety cannot escape from his liability thereunder by proving that the tenant had, previously to the giving of the guarantee, been guilty of gross irregularity and delay in the payment of such rent, and was, moreover, at the date thereof indebted in a large sum of money for arrears of rent (*t*).

Disclosure to a surety for a surety of indebtedness of principal debtor.

On the other hand, the omission to disclose to a surety for a surety the fact that when the second guarantee was given the principal debtor was indebted to a very large amount affords some evidence of fraud, where, at least, a written agreement sent to the surety's surety for perusal is framed so as to mislead the latter and allay his suspicions (*a*). However, where a guarantee policy is given for the solvency of a surety for the maker of a promissory note, the non-disclosure by the holders of such policy of the rate of interest and the circumstances of the loan obtained by means of the promissory note will not afford any defence to the guarantors in the absence of evidence that these facts so withheld were material to the ordinary risk undertaken by them (*b*).

Non-disclosure of previous defalcations of subject of fidelity guarantee.

The omission of an employer to disclose to the intending surety for another that the latter had previously committed defalcations in the plaintiff's service and had agreed to repay them at a certain rate per month will apparently relieve the surety from liability under his guarantee (*c*).

(*q*) *Kirby* v. *Marlborough* (*Duke*) (1813), 2 M. & S. 18, *per* Lord ELLENBOROUGH, C.J., at p. 22. In the case of a promissory note given by a principal and surety for a definite sum payable on a fixed day the note is presumed to be given in consideration of an immediate advance at the date of the note, and the burden of proving that such was not the case, and that the note was given to secure the payment of the balance of an account current between the principal and the payee, lies on the latter (*Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L. R. 10 Eq. 467).

(*r*) *Williams* v. *Rawlinson* (1825), 3 Bing. 71, *per* BEST, C.J., at p. 77.

(*s*) *Stokesleigh Guardians* v. *Stoddart* (1853), 2 W. R. 14; and see *Lawder* v. *Lawder* (1873), 7 I. R. C. L. 57.

(*t*) *Roper* v. *Cox* (1882), 10 L. R. Ir. 200; and see *Home Insurance Co.* v. *Holway* (1881), 39 American Reports, 179.

(*a*) *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482; see also *Blest* v. *Brown* (1862), 3 Giff. 450.

(*b*) *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135.

(*c*) *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, *per* QUAIN, J., at p. 672; and see *Smith* v. *Bank of Scotland* (1812), 1 Dow, 272, H. L.; *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934, H. L.; *Lawder* v. *Lawder* (1873), 7 I. R. C. L. 57; and compare *Federal Supply and Cold Storage Co. of South Africa* v. *Anghern and Piel* (1910), 80 L. J. (P. C.) 1.

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Misrepresentation.

1019. Misrepresentation, as distinguished from concealment, may be either written (*d*) or verbal (*e*), and may consist of such a suppression of the truth by the partial, inaccurate, and deceitful setting forth by the creditor of facts within his knowledge material for the proposed surety to be informed of as, along with the non-communication of the facts material for the latter to know, amounts to misrepresentation (*f*). It must, however, in every case depend upon the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist, this being a question of fact proper for a jury in each case (*g*).

Misrepresentation usually consists of direct assertion of a fact which is not a fact and which is calculated to influence a person becoming a surety (*h*).

Example of misrepresentation.

1020. Moreover, it is also misrepresentation to frame a guarantee so as to mislead a surety as to its real effect and meaning (*i*), though it will not be set aside on this ground if the surety has merely not been informed as to its tenor or meaning prior to its execution by him, if he could have procured information on the subject, but did not ask for it (*k*).

Cancellation of guarantee.

1021. The surety may apply to the Chancery Division of the High Court to have a guarantee which he has executed delivered up and cancelled where it is liable to be completely avoided on the ground of fraud (*l*), but the court has no jurisdiction to direct the cancellation of an instrument in respect of any claim on which there is a good legal defence, or to declare that there is no liability

(*d*) *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482.

(*e*) *Blest* v. *Brown* (1862), 8 Jur. (N. S.) 602.

(*f*) *Lee* v. *Jones*, *supra*, *per* SHEE, J., at p. 498; and see *Willis* v. *Willis* (1850), 17 Sim. 218.

(*g*) *Lee* v. *Jones*, *supra*.

(*h*) *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224. Thus, if to a question asked by the proposed surety as to the existence of trade debts owing by the principal debtor the creditor's agent replies in the negative, when in point of fact there is one such debt owing, this amounts to misrepresentation (*Blest* v. *Brown*, *supra*), as does also a gratuitous assertion that an estate is free from incumbrances, other than those specifically mentioned, when in fact there is another and undisclosed incumbrance (*Willis* v. *Willis*, *supra*); and see title MISREPRESENTATION AND FRAUD.

(*i*) *Small* v. *Currie* (1853), 2 Drew. 102, *per* KINDERSLEY, V.-C., at p. 114; *Squire* v. *Whitton* (1848), 1 H. L. Cas. 333; *Lee* v. *Jones*, *supra*.

(*k*) *Small* v. *Currie*, *supra*, *per* KINDERSLEY, V.-C., at p. 114; *Blake* v. *Bayne*, [1908] A. C. 371, P. C.; and see *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A.; *Bagot* v. *Chapman*, [1907] 2 Ch. 223, and p. 540, *ante*; but see *Batten*, *Carne*, *and Carne's Banking Co., Ltd.* v. *Reed* (1902), *Times*, 14th February. Similarly, if a person's signature to a bill of exchange is obtained upon a fraudulent representation that it is a guarantee, and the defendant signs it as surety without knowing that it is a bill and in the belief that it is a guarantee and is not guilty of negligence, he will not be bound thereby (*Foster* v. *Mackinnon*, *supra*; *Lewis* v. *Clay* *supra*).

(*l*) *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450, *per* MALINS, V.-C., at pp. 458, 459; *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, *per* BLACKBURN, J., at p. 682; and see *Duncan* v. *Worrall* (1822), 10 Price, 31; *Cooper* v. *Joel* (1859), 27 Beav. 313; p. 508, *ante*, and title EQUITY, Vol. XIII., pp. 52, 62.

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upon it (*m*). If there is danger of the evidence for the defence being lost, the remedy is not an action for cancellation, but an action to perpetuate testimony (*n*).

One of two sureties joining the principal debtor in a bond cannot maintain an action to set aside the transaction on the ground of fraud, or for an account of the payment of the bond, without making the principal debtor and the co-surety necessary parties (*o*).

SUB-SECT. 2.—*Material Alteration* (*p*).

Alteration of the guarantee.

1022. A guarantee is invalidated, and the sureties thereunder are released, by its conversion, if not under seal, into a deed (*q*) by affixing seals thereto opposite to their signatures (*r*), or by the striking out of the names of persons who are co-sureties (*s*), or by the addition, after its execution, of words reducing to a less amount the liability of one of several joint and several sureties for a given sum each (*t*).

In order to invalidate the guarantee the unauthorised alterations effected therein must have been made while the altered document was in the custody of the creditor, who, so long as it is in his possession, is bound to preserve it in its original state (*u*).

(*m*) *Brooking* v. *Maudslay, Son & Field* (1888), 38 Ch. D. 636; and see *Thornton* v. *Knight* (1849), 16 Sim. 509, 510.

(*n*) *Ibid.*; and see *Angell* v. *Angell* (1822), 1 Sim. & St. 83; title EQUITY, Vol. XIII., p. 44.

(*o*) *Allan* v. *Houlden* (1843), 6 Beav. 148.

(*p*) See title CONTRACT, Vol. VII., pp. 424 *et seq.*

(*q*) Formerly, any alteration in a deed made by the obligee avoided it (*Pigot's Case* (1614), 11 Co. Rep. 26 b). Now, however, in order to have this effect the alteration must, in the case of a deed or agreement not under seal, be material (*Crediton* (*Bishop*) v. *Exeter* (*Bishop*), [1905] 2 Ch. 455, following *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573), that is, one having an effect on some contract or right contained in or arising out of the instrument itself (*Caldwell* v. *Parker* (1869), 3 I. R. Eq. 519, *per* WALSH, M.R., at p. 526). Where an immaterial alteration was made by the creditor in a guarantee with the principal debtor's consent, the surety was held, even before the decision in *Crediton* (*Bishop*) v. *Exeter* (*Bishop*), *supra*, not to be discharged thereby (*Andrews* v. *Lawrence* (1865), 19 C. B. (N. S.) 768).

(*r*) *Davidson* v. *Cooper* (1844), 13 M. & W. 343, 352, Ex. Ch.; but see *Barnes* v. *Richards* (1902), 71 L. J. (K. B.) 341, 345. The removal of the seal from the name of one of the obligors of a several bond does not discharge the other obligors (*Collins* v. *Prosser* (1823), 1 B. & C. 682). As to cancellation of deeds generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 409 *et seq.*

(*s*) *Bank of Hindostan, China, and Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241; *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555.

(*t*) *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; see also *Bank of Hindostan, China, and Japan* v. *Smith*, *supra*; *Gardner* v. *Walsh* (1855), 5 E. & B. 83. The addition of a third party to a note originally issued as a joint and several promissory note by two persons is a material alteration of the note (*Gardner* v. *Walsh*, *supra*, overruling *Catton* v. *Simpson* (1838), 8 Ad. & El. 136). Where a guarantee is by the addition of such words as "at any time" converted into a continuing guarantee without the authority or consent of the surety, the words so added will be disregarded and the guarantee confined to one transaction only, if such be its expressed original limit of liability (*Bovill* v. *Turner* (1815), 2 Chit. 205, where a guarantee for the supply of coals for £50 at one time was subsequently altered into a continuing guarantee up to that pecuniary limit by the addition of the words "at any time"; and see *Jones* v. *Beach* (1852), 2 De G. M. & G. 886).

(*u*) *Davidson* v. *Cooper*, *supra*, *per* DENMAN, C.J., at p. 352; *Bank of Hindostan, China, and Japan* v. *Smith*, *supra*.

SUB-SECT. 3.—*Failure of Consideration.*

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Failure of the consideration.

1023. Total failure of the consideration (*a*) for the surety's promise of guarantee will discharge him, and affords a good ground of defence to an action by the creditor against the surety, who, in such circumstances, is entitled to have the guarantee delivered up to him (*b*).

Where a bank gives a letter of credit permitting a company to draw bills upon it in consideration of the latter undertaking to do certain things with a view to providing means for the meeting of such bills when they become due, sureties for the fulfilment of such undertaking will not be discharged from liability under their guarantee on the ground of failure of consideration where, owing to the subsequent failure of the bank, after accepting such bills, the company wrongfully refuses to carry out its undertaking and the bills are, partly in consequence of such refusal, not met at maturity (*c*).

SUB-SECT. 4.—*Non-fulfilment of Conditions Precedent.*

Non-compliance with conditions.

1024. When conditions precedent to the liability of the surety have not been fulfilled (*d*), or have become incapable of fulfilment (*e*), the surety is entitled to be relieved altogether from liability and to have his guarantee delivered up to be cancelled (*f*). He may obtain such relief either in an action brought by him (*g*), or else, should

(*a*) As to the consideration for a promise of guarantee, see pp. 450 *et seq.*, *ante*.

(*b*) *Cooper* v. *Joel* (1859), 1 De G. F. & J. 240; *Pavy* v. *Smith* (1901), 17 T. L. R. 471. Thus, where the consideration for a guarantee is the postponement, with the consent of the execution creditor, of a sale of goods by the sheriff, and notwithstanding such consent the sale takes place, because the requisite consent of another person to such postponement is not obtained, the surety is discharged from liability (*Cooper* v. *Joel*, *supra*, where the execution creditors seem to have represented to the surety that they had power to stop the sale and that it would be stopped). So, also, a surety for payment of a composition to creditors is discharged from liability where subsequently the debtor is made a bankrupt and the composition is annulled (*Walton* v. *Cook* (1888), 40 Ch. D. 325); and such a surety will also be discharged from liability where the deed of composition is framed so as to require that all the creditors shall accept the composition thereby secured and all the creditors do not execute the deed (*Latter* v. *White* (1870), L. R. 5 Q. B. 622, *per* COCKBURN, C.J., at p. 641, whose *dictum* is unaffected by the reversal of his decision on another point (1871), L. R. 6 Q. B. 474, Ex. Ch.; reversal affirmed (1872), L. R. 5 H. L. 578; and see *Weighton* v. *Cuthbert & Son* (1906), 14 Scots Law Times, 251).

(*c*) *Re Barber & Co.*, *Ex parte Agra Bank* (1870), L. R. 9 Eq. 725.

(*d*) See pp. 489 *et seq.*, *ante*. A condition precedent has been defined to be "one which the party, for whose benefit it was inserted, can insist upon being fulfilled before he carries out the contract" (*Century Shipping Co., Ltd.* v. *Symons & Co.* (1904), *Times*, 17th March, C. A., *per* COLLINS, M.R.). See title CONTRACT, Vol. VII., pp. 432 *et seq.*

(*e*) *Rickaby* v. *Lewis* (1905), 22 T. L. R. 130; and see *Latter* v. *White* (1872), L. R. 5 H. L. 578.

(*f*) *Evans* v. *Bremridge* (1855), 2 K. & J. 174; *Fitzgerald* v. *M'Cowan*, [1898] 2 I. R. 1; *Rice* v. *Gordon* (1848), 11 Beav. 265; *Underhill* v. *Horwood* (1804), 10 Ves. 209.

(*g*) Such an action must be brought in the Chancery Division of the High Court, to which it is specially assigned (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34). Where there is no right of contribution amongst sureties any one

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he be defendant to an action on the guarantee, by means of a defence relying on the equity to have the guarantee set aside and cancelled (*h*).

A surety is not, however, discharged from liability by reason of the principal debtor unjustifiably refusing to fulfil some condition or undertaking beneficial both to the creditor and to the surety (*i*).

SECT. 3.—*Discharge from Liability* (*j*).

SUB-SECT. 1.—*Variation of the Terms of the Principal Contract.*

Material variation in the terms of the contract.

1025. Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety (*k*), who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed (*l*). When a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract, and if the creditor, without the consent of the surety, alter those terms to the prejudice of the surety, the latter will be free (*m*), it being the clearest

of them may sue in the Chancery Division to have the guarantee cancelled without joining the other sureties as parties (*Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424). See also p. 508, *ante*.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2); *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145; *Breslauer* v. *Barwick* (1876), 24 W. R. 901; *Storey* v. *Waddle* (1879), 4 Q. B. D. 289, C. A.; *Gathercole* v. *Smith* (1881), 7 Q. B. D. 626, C. A.; *Blest* v. *Brown* (1862), 3 Giff. 450; and see *Luning* v. *Milton* (1890), 7 T. L. R. 12; *Lawrence* v. *Walmsley* (1862), 12 C. B. (N. S.) 799; *Evans* v. *Bremridge* (1885), 2 K. & J. 174.

(*i*) *Re Barber & Co., Ex parte Agra Bank* (1870), L. R. 9 Eq. 725.

(*j*) For discharge by operation of the Statutes of Limitation, see title LIMITATION OF ACTIONS.

(*k*) *General Steam Navigation Co.* v. *Rolt* (1859), 6 C. B. (N. S.) 550; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A.; *Browne* v. *Carr* (1831), 7 Bing. 508, *per* TINDAL, C.J., at p. 515; *Re Wolmershausen, Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541; and see *Toames Co-operative Agricultural and Dairy Society, Ltd.* v. *Foley*, [1910] 2 I. R. 277, C. A.; *Cosford Union* v. *Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd.* (1910), 103 L. T. 463. As to disclosure of variations, see pp. 540, 541, *ante*.

(*l*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, 763, P. C.; *Newton* v. *Chorlton* (1853), 10 Hare, 646, *per* WOOD, V.-C., at pp. 652, 653. So, a surety for payment of a composition to creditors by the principal debtor is discharged from liability to a particular creditor, who, without his consent or knowledge, obtains from the principal debtor an agreement binding the latter to pay the creditor's debt in full (*Mayhew* v. *Boyes* (1910), 103 L. T. 1, C. A.).

(*m*) *Stewart, Moir, and Muir* v. *Brown* (1871), 9 Macph. (Ct. of Sess.) 763, *per* Sir JAMES MONCREIFF, Lord Justice-Clerk, at p. 766; but see *Nicolsons* v. *Burt* (1882), 10 R. (Ct. of Sess.) 121. In order to enable a creditor to deal as he likes with the principal debtor without discharging the surety, guarantees often provide that the creditor shall be at liberty to act as though the surety were a principal debtor, and to regard him as such (see Encyclopædia of Forms and Precedents, Vol. VI., p. 192; *Greenwood* v. *Francis*, [1899] 1 Q. B. 312, C. A.; *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464, C. A.), or that the surety shall be treated as though he were jointly liable with the principal debtor (see Encyclopædia of Forms and Precedents, Vol. VI., pp. 194, 211), or that the creditor shall be at liberty to give time or other indulgence to the principal debtor without impairing the guarantee

and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have a concern in every transaction with the principal debtor (*n*), and who cannot as surety be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed (*o*). Thus, a surety for the performance of an agreement which provides that advances shall be made to the principal debtor by means of consignments is discharged from liability if acceptances are substituted for the consignments (*p*). So a surety for payment of an annuity is wholly discharged from liability by the alteration, without his consent, of the time for and terms of its redemption (*q*).

Release of property pledged.

1026. Where a surety pledges his personal credit by bond or covenant, and by the same contract also pledges his goods, or mortgages or charges his lands, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the back of the surety, as, for example, by a consolidation deed, with a fresh covenant for payment of the principal sum and other moneys subsequently advanced at a later date, will discharge the surety from all personal liability and also release the property which the surety has included in the contract (*r*).

(see Encyclopædia of Forms and Precedents, Vol. VI., pp. 246, 253, 255). Provisions of this kind are specially useful in the case of guarantees given to banks; or for the performance of building contracts; or for the payment of rent by co-operative societies, to whom one or more small holdings are about to be let by a county council with the consent of the Board of Agriculture and Fisheries under the provisions (see especially s. 9) of the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36).

(*n*) *Rees* v. *Berrington* (1795), 2 Ves. 540, *per* Lord LOUGHBOROUGH, L.C., at p. 543.

(*o*) *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, 603, P. C.; and see *Polak* v. *Everett* (1876), 1 Q. B. D. 669, C. A.; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A.; *Grant* v. *Budd* (1874), 30 L. T. 319, *per* BLACKBURN, J., at p. 320.

(*p*) *Bellingham* v. *Freer* (1837), 1 Moo. P. C. C. 333. A surety to the vendor of ships for payment of the purchase-money by the purchasers is discharged from liability by the improper user by the vendor of one of the ships sold, which the latter had agreed with the purchasers to freight (*Burke* v. *Rogerson* (1866), 12 Jur. (N. S.) 635, C. A.). Where the principal contract obliges the creditor to give three months' notice to the principal debtor requiring him to pay, and the creditor fails to give such notice, the surety will be discharged, even though, owing to the death of the principal debtor, it has become impossible to fulfil this requirement (*Rickaby* v. *Lewis* (1906), 22 T. L. R. 130).

(*q*) *Eyre* v. *Bartrop* (1818), 3 Madd. 221. So where a surety guarantees the redemption by the principal debtor of shares in a company to which the principal debtor is about to assign his business, and afterwards the mode of redemption is altered without the surety's consent, and to his prejudice, by substituting for certain book debts (made applicable by the principal agreement to the redemption of the shares) certain other shares and cash, the surety will be discharged (*Polak* v. *Everett*, *supra*). A guarantee given for the due performance of a shipbuilding contract which stipulates for payment by instalments as certain stages of the work are reached is discharged if the building owner allows the greater portion of the last two instalments to be anticipated (*General Steam Navigation Co.* v. *Rolt* (1859), 6 C. B. (N. S.) 550; *Calvert* v. *London Dock Co.* (1838), 2 Keen, 638; *Warre* v. *Calvert* (1837), 7 Ad. & El. 143). In the two last-mentioned cases a surety for a contractor was relieved from liability because advances had been made to the latter greater than the works contract permitted.

(*r*) *Bolton* v. *Salmon*, [1891] 2 Ch. 48.

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Fraudulent variations not discharging the surety.

1027. Certain departures from the terms of the principal contract will not, however, discharge the surety (*s*). Thus, a surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by the fraudulent act or omission, against which the surety, by the contract of suretyship, has guaranteed the employer (*t*) to whom the surety owes a duty to see that the principal performs his obligations (*a*). Therefore sureties who have guaranteed that a works contract shall be well and truly executed will not be discharged by the payment to the contractor of retention moneys upon a final certificate obtained by fraud of the contractor from the owner of the works, as such fraud is one of the risks covered by and incident to such a guarantee (*b*). Nor will a surety be discharged from liability where the principal debtor has by fraud obtained an increase of salary from his employers thereby varying the principal contract (*c*).

Variations not fraudulent.

1028. A surety who has guaranteed the due performance of a building contract, which entitles the employers to superintend the execution of the works, will not be discharged by the mere non-exercise of the right of superintendence (*d*), as a mere omission on the part of an employer holding a guarantee will not discharge a surety, unless, apparently, it is an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled (*e*). Where a guarantee for an agent leaves the mode of accounting between him and his principals to the discretion of the latter, who by an agreement with him substitute for the original method of accounting another of a different but reasonable character, the surety will not be discharged (*f*); nor will he necessarily be discharged by the employers' acquiescence in an irregular mode of accounting (*g*), nor by the employers' non-compliance with their bye-laws for the examination of their servants' accounts (*h*), nor by negligence in auditing the accounts, nor by allowing the principal debtor to retain in his hands balances far exceeding the amount permitted by the suretyship bond and principal contract, without payment being required or notice given to the surety (*i*).

(*s*) As to the effect of changing the duration of a servant's employment, see p. 496, *ante*.

(*t*) *Kingston-upon-Hull Corporation* v. *Harding*, [1892] 2 Q. B. 494, C. A., *per* BOWEN, L.J., at pp. 504, 505; and see *Bramley Union Guardians* v. *Guarantee Society* (1900), 64 J. P. 308, C. A.

(*a*) *Creighton* v. *Rankin* (1840), 7 Cl. & Fin. 325, H. L.

(*b*) *Kingston-upon-Hull Corporation* v. *Harding*, *supra*; and see *Dawson* v. *Lawes* (1854), Kay, 280.

(*c*) *Bramley Union Guardians* v. *Guarantee Society*, *supra*.

(*d*) *Kingston-upon-Hull Corporation* v. *Harding*, *supra*.

(*e*) *Ibid.*, *per* BOWEN, L.J., at p. 508.

(*f*) *Stewart* v. *M'Kean* (1855), 10 Exch. 675; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A.

(*g*) *Durham Corporation* v. *Fowler* (1889), 22 Q. B. D. 394 (rate collector).

(*h*) *Price* v. *Kirkham* (1864), 3 H. & C. 437.

(*i*) *Creighton* v. *Rankin*, *supra*.

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In the case of a guarantee, limited as to amount, for the due and regular payment of goods to be supplied to a trader the surety is not discharged by a subsequent agreement between the vendors and the trader providing that the latter shall purchase from them all the goods he requires for his business, or in default pay them a fixed commission on all goods he may purchase elsewhere (*k*). An indemnity in respect of all liability to be incurred in giving a bond to the Treasury is applicable to a payment subsequently made by the obligor of such bond to the Treasury for the express purpose of obtaining the cancellation of the bond originally given, where the surety's position has not been materially altered by such payment (*l*).

Part variation.

1029. Where a person has become surety for the performance of two things which are separate and distinct, a subsequent variation, without the surety's consent, of the principal contract as to one of them only will not relieve the surety from liability in respect of the other thing should it not be performed (*m*).

Removal of moral inducement.

1030. That which merely deprives the principal debtor of a moral inducement to perform his contract will apparently not discharge his surety from liability (*n*).

Variation with surety's consent.

1031. The surety is not discharged by any variation, though material, of the principal contract, if made with his concurrence (*o*). But apparently he is not bound to warn the creditor against doing some act in actual contemplation, of which he has knowledge, and which, if done, will discharge him (*p*); nor will his mere knowledge of irregularities committed by the creditor in carrying out the principal contract necessarily amount to consent thereto (*q*).

Surety contracting "on the faith" of the principal contract.

1032. Where a surety desires that all or any variations of the principal contract shall relieve him from liability, whether they be material or not, he must state in his guarantee that he contracts "on the faith" of the principal contract (*r*); otherwise, unless the

(*k*) *Stewart and McDonald* v. *Young* (1894), 38 Sol. Jo. 385.

(*l*) *Webster* v. *Petre* (1879), 4 Ex. D. 127.

(*m*) *Harrison* v. *Seymour* (1866), L. R. 1 C. P. 518; and see *Croydon Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46, C. A.; *Skillett* v. *Fletcher* (1867), L. R. 2 C. P. 469, Ex. Ch.

(*n*) *Grant* v. *Budd* (1874), 30 L. T. 319, *per* BLACKBURN, J., at p. 320.

(*o*) *Woodcock* v. *Oxford and Worcester Rail. Co.* (1853), 1 Drew. 521; and see *Oakford* v. *European and American Steam Shipping Co.* (1863), 1 Hem. & M. 182; *Swire* v. *Redman* (1876), 1 Q. B. D. 536; *Browne* v. *Carr* (1831), 7 Bing. 508, 515, 516; *Hollier* v. *Eyre* (1842), 9 Cl. & Fin. 1, H. L., *per* Lord COTTENHAM, at p. 52; *Re Blakely, Ex parte Harvey, Ex parte Springfield* (1854), 4 De G. M. & G. 881, C. A., *per* TURNER, L.J., at p. 899. As to a surety's revival of his liability by a subsequent promise or consent, see *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, *per* QUAIN, J., at pp. 676, 677; *Mayhew* v. *Crickett* (1818), 2 Swan. 185; *Smith* v. *Winter* (1838), 4 M. & W. 454.

(*p*) *Polak* v. *Everett* (1876), 1 Q. B. D. 669, C. A., *per* BLACKBURN, J., at p. 673; and see *Rees* v. *Berrington* (1795), 2 Ves. 540; 2 White & Tud. L. C., 7th ed., 568.

(*q*) *Warre* v. *Calvert* (1837), 7 Ad. & El. 143, *per* LITTLEDALE, J., at p. 155.

(*r*) See Encyclopædia of Forms and Precedents, Vol. VI., p. 204; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A.; *Sanderson* v. *Aston* (1873), L. R. 8 Exch. 73, 76; *Whitcher* v *Hall* (1826), 5 B. & C. 269.

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surety can prove that he received notice of the terms of such contract (*s*), or has embodied such terms in his own contract of guarantee (*t*), nothing short of a material variation of these terms will operate to discharge him from liability (*a*).

Alteration of surety's position a question of fact.

1033. Whether in any particular case the position of the surety has been altered is a question of fact and not of law, though there may be facts which would make it obviously impossible not to say that in law there is an alteration of the position of the surety (*b*). The surety will, however, be discharged, where, at least, he contracts "on the faith" of the principal contract, if it is not self-evident, without inquiry, that the variation complained of will prove beneficial, or at least not prejudicial, to him (*c*).

SUB-SECT. 2.—*Variation without the Surety's Consent of his own Contract with the Creditor.*

Variations of surety's contract generally discharge him.

1034. Any variation of the contract of the surety with the creditor (*d*), whether it be of the express terms of the guarantee itself or of the embodied terms of the principal contract (*e*), which is not obviously and without inquiry quite unsubstantial, will discharge the surety from liability (*f*), whether it injure him or not (*g*). Where, therefore, a guarantee stipulates that a certain

(*s*) *Sanderson* v. *Aston* (1873), L. R. 8 Exch. 73, 76; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A.; *Stewart* v. *M'Kean* (1855), 10 Exch. 675. A surety who receives notice of the terms of the principal contract is deemed to contract "on the faith" thereof (*ibid.*).

(*t*) *Glyn* v. *Hertel* (1818), 8 Taunt. 208; *Garrett* v. *Handley* (1825), 4 B. & C. 664; *Holme* v. *Brunskill*, *supra*; but see *Baynton* v. *Morgan* (1888), 21 Q. B. D. 101. Where the terms of the principal contract are embodied in a guarantee, any breach thereof is a breach of the guarantee itself and therefore discharges the surety; see *Bacon* v. *Chesney* (1816), 1 Stark. 192; *Blest* v. *Brown* (1862), 3 Giff. 450; *Whitcher* v. *Hall* (1826), 5 B. & C. 269; *Holme* v. *Brunskill*, *supra*, *per* COTTON, L.J., at p. 505.

(*a*) *Holme* v. *Brunskill*, *supra*; *Stewart* v. *M'Kean*, *supra*.

(*b*) *Kingston-upon-Hull Corporation* v. *Harding*, [1892] 2 Q. B. 494, C. A., *per* BOWEN, L.J., at p. 506.

(*c*) *Holme* v. *Brunskill*, *supra*. If a surety has joined in a bond for £1,000, and the creditor agrees that the debt shall be £500 only, then the alteration can only be for the benefit of the surety, and his responsibility cannot be lost by the change (*Croydon Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46, C. A., *per* AMPHLETT, J. A., at p. 51).

(*d*) Many of the cases cited at pp. 479 *et seq.*, *ante*, upon the extent of the surety's liability, and which show that his contract is one *strictissimi juris*, also exemplify this sub-section.

(*e*) See p. 549, *ante*, and notes (*s*) and (*t*), *supra*, where cases are cited to show that, when the terms of the principal contract are embodied in the guarantee itself, any variation thereof also constitutes a variation of the surety's contract with the creditor, and necessarily, therefore, discharges him from liability.

(*f*) *Holme* v. *Brunskill*, *supra*, *per* COTTON, L.J., at pp. 505, 506. In the following cases the surety was held not to be discharged, as there had been no real variation of the terms of the guarantee: *Davey* v. *Phelps* (1841), 2 Man. & G. 300; *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, P. C.; *Price* v. *Kirkham* (1864), 3 H. & C. 437; *Evans* v. *Earle* (1854), 10 Exch. 1; *Re Wolmershausen*, *Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541.

(*g*) *General Steam Navigation Co.* v. *Rolt* (1859), 6 C. B. (N. S.) 550, 575; *Whitcher* v. *Hall*, *supra*; *Wright* v. *Sandars* (1857), 3 Jur. (N. S.) 504; *Bowmaker* v. *Moore*, *Shirreff and Treles* (1819), 7 Price, 223; *Luning* v. *Milton* (1890), 7 T. L. R. 12.

period of credit shall be given to the principal debtor, this stipulation must be strictly adhered to (*h*). If, however, no definite period of credit be prescribed by the guarantee, then a reasonable credit must be given (*i*), and not merely the strict "customary credit" of the trade (*k*). Again, a surety for payment of a bill of exchange for a stated sum of money will not be liable, even for that sum, if the bill be given for a different amount (*l*), nor in the case of renewed bills unless they substantially correspond with the originals (*m*). A surety who has agreed to pay whatever another party is made to pay under a policy of insurance is not liable for sums paid by the latter under a scheme of arrangement substituted for the policy (*n*). A surety bond conditioned for payment by the defendant in an action of a sum to be awarded by the judgment of a court does not extend to a sum awarded under a judgment obtained by consent (*o*). Moreover, a surety whose liability is defined by one Act of Parliament may, in consequence of a change in his position accomplished by a subsequent statute, be wholly discharged (*p*).

Strict adherence to terms necessary.

1035. Strict adherence to the terms of the surety's contract is required. Thus, a surety is not liable for moneys to be received by another, unless that other personally received them (*q*), and, if a person has become a surety for the due accounting for moneys received by one person alone, he is not liable for the latter's default jointly with another (*r*). Moreover, where a surety stipulates for an advance of money to be made to a third person, this stipulation will not be satisfied by the mere giving of credit for a promissory note without a cash advance (*a*). A surety who has guaranteed the payment of gold to be supplied to a goldsmith for the purposes of his trade will not be liable if partly gold and partly money be given (*b*), nor will a surety, who has agreed to guarantee the payment of flour of a particular kind to be supplied to another to

(*h*) *Bacon* v. *Chesney* (1816), 1 Stark. 192, *per* Lord ELLENBOROUGH, C.J., at p. 193.

(*i*) *Henton* v. *Paddison* (1893), 68 L. T. 405. This being so, it is difficult to understand why it was held in *Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, that the Statute of Limitations runs in favour of a surety for a customer to whom advances have been made by his bankers, not from a reasonable time after each advance, or, as was held in the previous case of *Hartland* v. *Jukes* (1863), 1 H. & C. 667, which was not cited in the later case, from the time when a balance is struck and a claim is made, but from the date of each advance. See also *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401, 406. As to duration of liability on guarantees, see pp. 491 *et seq.*, *ante*. As to operation of Statutes of Limitation, see, generally, title LIMITATION OF ACTIONS.

(*k*) *Simpson* v. *Manley* (1831), 2 Cr. & J. 12.

(*l*) *Philips* v. *Astling* (1809), 2 Taunt. 206; and see *Pickles* v. *Thornton* (1875), 33 L. T. 658, C. A.; *Clarke* v. *Green* (1849), 3 Exch. 619.

(*m*) *Barber* v. *Mackrell* (1892), 41 W. R. 341, C. A.

(*n*) *Mortgage Insurance Corporation* v. *Pound* (1895), 64 L. J. (Q. B.) 394, C. A.

(*o*) *Tatum* v. *Evans* (1885), 54 L. T. 336.

(*p*) *Finch* v. *Jukes*, [1877] W. N. 211.

(*q*) *Mills* v. *Alderbury Union Guardians* (1849), 3 Exch. 590.

(*r*) *Ibid.*; and see *Bellairs* v. *Ebsworth* (1811), 3 Camp. 53; *London Assurance Co.* v. *Bold* (1844), 6 Q. B. 514.

(*a*) *Archer* v. *Hudson* (1844), 7 Beav. 551.

(*b*) *Evans* v. *Whyle* (1829), 5 Bing. 485.

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enable the latter to fulfil an order, be liable if flour of an inferior quality is delivered (*c*).

SUB-SECT. 3.— *Binding Agreement to give Time to the Principal Debtor.*

Effect of binding agreement by creditor to give time.

1036. A binding agreement (*d*) between the creditor and the principal debtor to give time to the latter, as distinguished from mere passive inactivity on the part of the former (not resulting from any contract with the principal debtor), will discharge the surety from liability (*e*), if made without his consent (*f*), whether he be prejudiced thereby or not (*g*). To have this effect, however, the parties must respectively occupy the relation of creditor, principal, and surety, as the giving of time will not discharge a mere *quasi*-surety (*h*). It is immaterial whether the surety became so originally or has, to the knowledge of the creditor, though without the latter's consent, by subsequent agreement with his co-debtor, ceased to be a mere co-debtor and become a surety (*i*). Moreover,

Essential qualities of such an agreement.

(*c*) *Blest* v. *Brown* (1862), 3 Giff. 450.

(*d*) *Clarke* v. *Birley* (1889), 41 Ch. D. 422; *Samuell* v. *Howarth* (1817), 3 Mer. 272, *per* Lord ELDON, L.C., at p. 278; and see *Creighton* v. *Rankin* (1840), 7 Cl. & Fin. 325, H. L.

(*e*) The following cases may be referred to in proof of the proposition in the text:—*Combe* v. *Wolfe* (1832), 8 Bing. 156; *Lewis* v. *Jones* (1825), 4 B. & C. 506, 515; *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L. 348; *Hawkshaw* v. *Parkins* (1819), 2 Swan. 539, *per* Lord ELDON, L.C., at p. 546; *Browne* v. *Carr* (1831), 7 Bing. 508, *per* TINDAL, C.J., at p. 515; *Newton* v. *Chorlton* (1853), 2 Drew. 333, 338; *Samuell* v. *Howarth*, *supra*; *Rees* v. *Berrington* (1795), 2 Ves. 540; *Nisbet* v. *Smith* (1785), 2 Bro. C. C. 579; *Blake* v. *White* (1835), 1 Y. & C. (EX.) 420; *Wright* v. *Simpson* (1802), 6 Ves. 714, 734; *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187; *Bailey* v. *Edwards* (1864), 4 B. & S. 761; *Ewin* v. *Lancaster* (1865), 12 L. T. 632; *Isaac* v. *Daniel* (1846), 8 Q. B. 500; *Pooley* v. *Harradine* (1857), 7 E. & B. 431; *English* v. *Darley* (1800), 2 Bos. & P. 61; *Davies* v. *Stainbank* (1855), 6 De G. M. & G. 679, C. A.; *Moss* v. *Hall* (1850), 5 Exch. 46; *Oakeley* v. *Pasheller* (1836) 10 Bli. (N. S.) 548, H. L.; *Greenough* v. *McClelland* (1860), 2 E. & E. 424; *Bolton* v. *Buckenham*, [1891] 1 Q. B. 278, C. A.; *Archer* v. *Hale* (1828), 4 Bing. 464; *Howell* v. *Jones* (1834), 1 Cr. M. & R. 97; *Eyre* v. *Bartrop* (1818), 3 Madd. 221; *Bank of Ireland* v. *Beresford* (1818), 6 Dow, 233, H. L.

(*f*) The guarantee may expressly authorise the creditor to give time to the principal debtor without discharging the surety (see Encyclopædia of Forms and Precedents, Vol. VI., pp. 246, 253, 255); see the cases cited at pp. 556, 557, *post*.

(*g*) *Samuell* v. *Howarth*, *supra*; *Polak* v. *Everett* (1876), 1 Q. B. D. 669, C. A.; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, C. A.; *R.* v. *Herron and Montgomery*, [1903] 2 I. R. 474; *Ex parte Wilson* (1805), 11 Ves. 410; *Blest* v. *Brown* (1862), 8 Jur. (N. S.) 602; *Petty* v. *Cooke* (1871), L. R. 6 Q. B. 790, 795; *Greenwood* v. *Francis*, [1899] 1 Q. B. 312, C. A., *per* A. L. SMITH, L.J., at p. 320; *Re Renton*, *Ex parte Glendinning* (1819), Buck, 517, *per* Lord ELDON, L.C., at p. 519; *Ex parte Gifford* (1802), 6 Ves. 805, 806; but see *Newton* v. *Chorlton*, *supra*, at p. 339.

(*h*) *Way* v. *Hearn* (1862), 11 C. B. (N. S.) 774; and see *Reade* v. *Lowndes* (1857), 23 Beav. 361. For examples of *quasi*-suretyship, see p. 442, *ante*.

(*i*) *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*), *supra*; *Maingay* v. *Lewis* (1870), 5 I. R. C. L. 229, Ex. Ch.; *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586, 591, 593; *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207, H. L.; *Pooley* v. *Harradine*, *supra*; *Leicestershire Banking Co.* v. *Hawkins* (1900), 16 T. L. R. 317. Prior to the introduction of equitable pleas it was doubtful whether a surety could at law set up as a defence to an action on a guarantee that he was discharged by time given to the principal debtor, where the original contract

the agreement giving time must be really binding and capable of enforcement (*k*) for valuable consideration (*l*) made with the principal debtor (*m*), and must actually give time (*n*). It need not, however, be express (*o*), and may be written or verbal, whether the guarantee be under seal or not (*p*).

between him and the creditor was not one of suretyship (*Manley* v. *Boycot* (1853), 2 E. & B. 46; *Strong* v. *Foster* (1855), 17 C. B. 201; *Lawrence* v. *Walmsley* (1862), 12 C. B. (N. S.) 799, 807; *Re Black, Ex parte Graham* (1854), 5 De G. M. & G. 356, C. A.; *Taylor* v. *Burgess* (1859), 5 H. & N. 1; *York City and County Banking Co.* v. *Bainbridge* (1880), 43 L. T. 732). As to the effect of giving time when the surety's property is also pledged, see p. 547, *ante*.

(*k*) *Clarke* v. *Birley* (1889), 41 Ch. D. 422; *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586, *per* Lord HERSCHELL, L.C., at p. 594. An inchoate agreement to give time will not discharge the surety (*Vernon* v. *Turley* (1836), 1 M. & W. 316; *Badnall* v. *Samuel* (1817), 3 Price, 521; *Price* v. *Edmunds* (1830), 10 B. & C. 578). The law requires that the creditor's hands shall be tied up before it can be said that time has been given in law (*Nicolsons* v. *Burt* (1882), 10 R. (Ct. of Sess.) 121, *per* INGLIS, Lord President, at p. 127). Thus, an agreement that if the creditor forbears to press for repayment of a loan a higher rate of interest will be paid by the principal debtor is not an agreement to give time if it remains optional with the creditor whether he will press for payment and he is not bound to a definite forbearance (*York City and County Banking Co.* v. *Bainbridge*, *supra*).

(*l*) *Blake* v. *White* (1835), 1 Y. & C. (EX.) 420; *Tucker* v. *Laing* (1856), 2 K. & J. 745; *Heath* v. *Key* (1827), 1 Y. & J. 434; *London Assurance Co.* v. *Buckle* (1820), 4 Moore (C. P.), 153; *Bell* v. *Banks* (1841), 3 Man. & G. 258; *Smith* v. *Winter* (1838), 4 M. & W. 454; *Petty* v. *Cooke* (1871), L. R. 6 Q. B. 790; *Price* v. *Kirkham* (1864), 3 H. & C. 437; *English* v. *Darley* (1800), 2 Bos. & P. 61, 62; *Hearn* v. *Cole* (1813), 1 Dow, 459, H. L.; *Brickwood* v. *Anniss* (1814), 5 Taunt. 614; *Philpot* v. *Briant* (1828), 4 Bing. 717; *Clarke* v. *Wilson* (1838), 3 M. & W. 208; *Badnall* v. *Samuel*, *supra*. So a mere honorary obligation on the part of a plaintiff not to press a defendant for payment of the debt and costs is not such an indulgence as will release the latter's bail (*Ladbrook* v. *Hewett* (1832), 1 Dowl. 488; *McManus* v. *Bark* (1870), L. R. 5 Exch. 65; *Rayner* v. *Fussey* (1859), 28 L. J. (EX.) 132).

(*m*) If the agreement giving time be made with a stranger (*Frazer* v. *Jordan* (1857), 8 E. & B. 303; *Lyon* v. *Holt* (1839), 5 M. & W. 250), or with one of several sureties (*Clarke* v. *Birley*, *supra*), or with any third party (*Clarke* v. *Birley*, *supra*, *per* NORTH, J., at p. 434), it will not discharge the surety.

(*n*) *Prendergast* v. *Devey* (1821), Madd. & G. 124, 126; *Price* v. *Edmunds*, *supra*; *Jay* v. *Warren* (1824), 1 C. & P. 532; *Pring* v. *Clarkson* (1822), 1 B. & C. 14; *Whitfield* v. *Hodges* (1836), 1 M. & W. 679; *Tatum* v. *Evans* (1885), 54 L. T. 336; *Rouse* v. *Bradford Banking Co.*, *supra*; *Munster and Leinster Bank* v. *France* (1889), 24 L. R. Ir. 82, C. A.; *Bolton* v. *Buckenham*, [1891] 1 Q. B. 278, C. A.; *Philpot* v. *Briant* (1828), 4 Bing. 717.

(*o*) *Blake* v. *White*, *supra*; *Croydon Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46, C. A.; *Cross* v. *Sprigg* (1850), 2 Mac. & G. 113; *Bolton* v. *Buckenham*, *supra*.

(*p*) Formerly, if the guarantee were under seal, the surety could not in an action brought thereon against him set up as a defence at law a parol agreement to give time until equitable defences were introduced by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 83 *et seq.*; *Davey* v. *Prendergrass* (1821), 5 B. & Ald. 187; *Blake* v. *White*, *supra*; *Wodehouse* v. *Farebrother* (1855), 5 E. & B. 277, 289). Equitable defences are now available in any court by virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2); and see *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145; *Nisbet* v. *Smith* (1785), 2 Bro. C. C. 579; and pp. 507, 508, 546, *ante*. The reason why an agreement to give time discharges the surety is because if, after making such an agreement, the creditor were to sue the surety the latter would at once be turned on the principal debtor in breach of the agreement to give time (*Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 142, *per* Lord HATHERLEY, L.C., at p. 150; *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L. 348; *Oakeley* v. *Pasheller*

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What constitutes "giving time" to the principal debtor.

1037. Extending the period, at which by the contract between them the principal debtor was originally obliged to pay the creditor, by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent, amounts to a "giving of time" (*q*). Thus, to substitute for payment in one sum payment by instalments amounts to a giving of time (*r*). Again, whenever the taking of a new security from the principal debtor by the creditor operates as a giving of time, the surety is no longer liable (*s*), but not where that transaction has no such effect (*t*). So the surety is discharged, where an action of replevin is by agreement referred to arbitration, and, without the consent or privity of the surety in the replevin bond, the time for making the award is enlarged (*a*), or where the creditor sues the principal debtor by direction of the surety, but without his privity agrees to stay execution (*b*). Where a bill has been accepted for another's accommodation, the acceptor will be discharged should time be given by the holder to the drawer (*c*), but not, apparently, where the giving of time is subsequent to the bill becoming due and to its presentation to the acceptor, who promises to pay (*d*). The doctrine that where time is given to the principal debtor the surety is discharged also applies where the suretyship arises under a promissory note payable on demand (*e*).

(1836), 10 Bli. (N. S.) 548, H. L.; *Samuell* v. *Howarth* (1817), 3 Mer. 272, *per* Lord ELDON, L.C., at p. 278; *Newton* v. *Chorlton* (1853), 2 Drew. 333, *per* WOOD, V.-C., at p. 338), so that the effect of such an agreement is to prevent the surety from either requiring the creditor to call upon the principal debtor to pay off the debt, or himself paying off the debt, and then suing the principal debtor, thereby prejudicing the surety (*Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch. 32, C. A., *per* A. L. SMITH, L.J., at p. 75; affirmed, [1894] A. C. 587).

(*q*) *Howell* v. *Jones* (1834), 1 Cr. M. & R. 97, *per curiam*, at p. 107.

(*r*) *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187; compare *Bellingham & Co.* v. *Hurley* (1908), *Times*, 4th April, C. A., reversing S. C. (1907), 52 Sol. Jo. 131, where the creditors, after obtaining judgment against the principal debtor for balance due on a joint and several promissory note payable on demand, signed by the principal debtor and surety, on same day as that on which judgment was obtained, arranged, without the surety's knowledge, that the principal debtor was to pay what he owed on the note by instalments and not to press their claim, and it was held that the surety was discharged.

(*s*) *Munster and Leinster Bank* v. *France* (1889), 24 L. R. Ir. 82, C. A.; *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L. 348, *per* Lord CAIRNS, L.C., at p. 361.

(*t*) *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*), *supra*; *Bell* v. *Banks* (1841), 3 Man. & G. 258; *Twopenny* v. *Young* (1824), 3 B. & C. 208. Thus, the acceptance of a *cognovit* by a creditor, whereby time is given to his debtor for payment of instalments, always discharges the latter's bail unless they are parties to the arrangement (*Bowsfield* v. *Tower* (1812), 4 Taunt. 456; but see *Hodgson* v. *Nugent* (1793), 5 Term Rep. 277). An order for judgment by consent is now usually resorted to instead of a *cognovit* (R. S. C., Ord. 41, rr. 9, 10), which, however, has not been abolished; see Yearly Practice of the Supreme Court, 1911, Vol. I., pp. 558, 559.

(*a*) *Bowmaker* v. *Moore*, *Shirreff* v. *Treles* (1819), 7 Price, 223.

(*b*) *Rees* v. *Berrington* (1795), 2 Ves. 540.

(*c*) *Laxton* v. *Peat* (1809), 2 Camp. 185.

(*d*) *Kerrison* v. *Cooke* (1813), 3 Camp. 362; compare *Torrance* v. *Bank of British North America* (1873), L. R. 5 P. C. 246.

(*e*) *Bellingham & Co., Ltd.* v. *Hurley*, *supra*, where the surety and principal debtor signed a joint and several promissory note, in consideration of an advance

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Mere omission on the part of the creditor to press the principal debtor for payment will not, if there be no binding agreement to give time, discharge the surety (*f*), even if the debtor subsequently becomes insolvent (*g*), unless the creditor is bound to use, before suing the surety, the utmost efforts against and to obtain payment from the principal debtor (*h*).

Effect of passive inactivity or omissions by creditor.

A surety may, apparently, be discharged by an omission on the part of the creditor to do some act which he has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled (*i*).

1038. Custom of trade does not justify the creditor in agreeing to give time to the principal debtor (*k*). In the case, however, of a general guarantee against loss in a course of dealing, the surety is not, apparently, liberated by the creditor taking a bill at one month from the principal debtor in payment of an account for goods supplied, as the principal debtor and creditor are free to arrange the details of their transaction as they see fit, provided these are not at variance with the ordinary custom of merchants (*l*).

Custom of trade does not justify the giving of time.

1039. In the case of a continuing guarantee, an agreement to give time may only partially relieve the surety from liability. Thus,

Partial relief by time being given.

to the latter, and afterwards judgment was obtained against the principal debtor for the balance due on the note, and for a sum for goods sold and delivered, and the surety was held discharged by an arrangement made the same day as that on which judgment was obtained, but not communicated to him, which, while it imposed certain conditions and obligations on the principal debtor, likewise bound the creditors not to press their claim against him.

(*f*) *Belfast Banking Co.* v. *Stanley* (1867), 1 I. R. C. L. 693; *Trent Navigation Co.* v. *Harley* (1808), 10 East, 34; *Overend, Gurney & Co. (Liquidators)* v. *Oriental Financial Corporation (Liquidators)* (1874), L. R. 7 H. L. 348; *London Assurance Co.* v. *Buckle* (1820), 4 Moore (C. P.), 153; *Peel* v. *Tatlock* (1799), 1 Bos. & P. 419; *Goring* v. *Edmonds* (1829), 6 Bing. 94; *York City and County Banking Co.* v. *Bainbridge* (1880), 43 L. T. 732; *Dawson* v. *Lawes* (1854), Kay, 280; *Mayhew* v. *Crickett* (1818), 2 Swan. 185; *Eyre* v. *Everett* (1826), 2 Russ. 381; *Boultbee* v. *Stubbs* (1811), 18 Ves. 20, 22; *Black* v. *Ottoman Bank* (1862), 10 W. R. 871, P. C.; *Samuell* v. *Howarth* (1817), 3 Mer. 272, 278; *Orme* v. *Young* (1815), Holt (N. P.), 84; *Mactaggart* v. *Watson* (1835), 3 Cl. & Fin. 525, H. L.; *Perfect* v. *Musgrave* (1818), 6 Price, 111; *Wright* v. *Simpson* (1802), 6 Ves. 714, 734; *Creighton* v. *Rankin* (1840), 7 Cl. & Fin. 325, 346, 347, H. L.; *Price* v. *Kirkham* (1864), 3 H. & C. 437, 441; *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288; *Kingston-upon-Hull Corporation* v. *Harding*, [1892] 2 Q. B. 494, 508, C. A.

(*g*) *Trent Navigation Co.* v. *Harley*, *supra*.

(*h*) *Holl* v. *Hadley* (1835), 2 Ad. & El. 758; *Watson* v. *Alcock* (1853), 4 De G. M. & G. 242, C. A.; *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911; *Mountague* v. *Tidcombe* (1705), 2 Vern. 518; but see *Musket* v. *Rogers* (1839), 5 Bing. (N. C.) 728. In *Petty* v. *Cooke* (1871), L. R. 6 Q. B. 790, BLACKBURN, J., at p. 795, expressed the opinion that it is not justice, though established by courts of equity, that time given by a creditor, which in numberless cases does not injure the surety, should, nevertheless, discharge him.

(*i*) *Kingston-upon-Hull Corporation* v. *Harding*, *supra*, *per* BOWEN, L.J., at p. 508; compare p. 548, *ante*.

(*k*) *Combe* v. *Wolfe* (1832), 8 Bing. 156; *Holl* v. *Hadley*, *supra*; *Howell* v. *Jones* (1834), 1 Cr. M. & R. 97.

(*l*) *Stewart, Moir, and Muir* v. *Brown* (1871), 9 Macph. (Ct. of Sess.) 763, *per* Sir JAMES MONCREIFF, Lord Justice-Clerk, at p. 766; and see *Allan* v. *Kenning* (1833), 9 Bing. 618; *Re Fox, Walker & Co., Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.; compare pp. 546 *et seq.*, *ante*.

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one supply of goods to the principal debtor under such a guarantee at a longer credit than the surety has stipulated for will not relieve the latter from liability in respect of a past or subsequent supply at the prescribed credit (*m*). So, where a contract is separable in character, a surety for the performance thereof will still be liable for the fulfilment of so much of the contract as is not affected by the agreement to give time (*n*).

Effect of reservation of remedies against the surety.

1040. Even where there is a binding agreement to give time to the principal debtor, the surety is not discharged (*o*) if the remedies against him are expressly reserved (*p*), with or without his consent or knowledge (*q*), except in special circumstances (*r*). Such reservation of remedies should usually appear on the face of the agreement giving time (*s*), though sometimes the reservation can be proved by parol evidence (*t*), but not if such evidence varies the instrument giving time (*a*).

When surety not discharged by time being given.

1041. If the surety's remedies are not interfered with by the agreement made between the creditor and the principal debtor which is objected to, it gives him no ground of defence (*b*), as where,

(*m*) *Bingham* v. *Corbitt* (1864), 34 L. J. (Q. B.) 37, Ex. Ch.

(*n*) *Croydon Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46, C. A., followed in *Dowden* v. *Levis* (1884), 14 L. R. Ir. 307.

(*o*) In *Webb* v. *Hewitt* (1857), 3 K. & J. 438, WOOD, V.-C., at p. 442, explains as follows why a reservation of rights prevents the discharge of the surety: "For, when the right is reserved the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial" (see also *Boultbee* v. *Stubbs* (1811), 18 Ves. 20, *per* Lord ELDON, L.C., at p. 26).

(*p*) *Kearsley* v. *Cole* (1846), 16 M. & W. 128, *per* PARKE, B., at pp. 135, 136; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.) 76, 83, 84; *Close* v. *Close* (1853), 4 De G. M. & G. 176, C. A.; *Owen and Gutch* v. *Homan* (1853), 4 H. L. Cas. 997, 1037; *Wyke* v. *Rogers* (1852), 1 De G. M. & G. 408; *Ex parte Gifford* (1802), 6 Ves. 805, 808; *Re Renton, Ex parte Glendinning* (1819), Buck, 517, 519; *Melvill* v. *Glendinning* (1816), 7 Taunt. 126; *Lindsay* v. *Downes* (*Lord*) (1840), 2 I. Eq. R. 307; *Muir* v. *Crawford* (1875), L. R. 2 Sc. & Div. 456; *Nichols* v. *Norris* (1831), 3 B. & Ad. 41, n.

(*q*) *Kearsley* v. *Cole*, *supra*, *per* PARKE, B., at p. 135; *Webb* v. *Hewitt*, *supra*; *Re Renton, Ex parte Glendinning*, *supra*; *Boaler* v. *Mayor*, *supra*; *Close* v. *Close*, *supra*; *Owen and Gutch* v. *Homan*, *supra*; *Wyke* v. *Rogers*, *supra*; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9, *per* WILLES, J., at p. 13.

(*r*) *Owen and Gutch* v. *Homan*, *supra*; and see p. 541, *ante*.

(*s*) *Re Renton, Ex parte Glendinning*, *supra*; *Boultbee* v. *Stubbs*, *supra*, at p. 22; *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L. 348.

(*t*) *Re Blakely, Ex parte Harvey, Ex parte Springfield* (1854), 4 De G. & M. & G. 881, C. A., *per* TURNER, L.J., at p. 899; *Norman* v. *Bolt* (1883), Cab. & El. 77; and see n. (a), 4 B. & C. 515, 516; but see *contrà*, *Re Renton, Ex parte Glendinning*, *supra*. Parol evidence is admissible to prove that there was a general understanding between the creditor and the principal debtor that the taking of a promissory note should not discharge the surety (see *Wyke* v. *Rogers*, *supra*).

(*a*) *Re Renton, Ex parte Glendinning*, *supra*, *per* Lord ELDON, L.C., at p. 520; *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317, P. C.

(*b*) *Petty* v. *Cooke* (1871), L. R. 6 Q. B. 790, *per* BLACKBURN, J., at p. 795.

for example, his own remedies are thereby accelerated (*c*). Moreover, a surety is not discharged by an agreement giving time where he has himself agreed not to require the principal debtor to relieve him until he has himself been sued (*d*), and, apparently, an extension of time to the principal debtor, though made with the creditor's consent, will not discharge the surety if it amount to a judicial act (*e*). Again, an agreement to give time to the principal debtor will not discharge a surety if it is made after the creditor has obtained judgment against the surety (*f*), nor after the surety has by agreement with the creditor converted himself into a debtor (*g*), nor if he has agreed in his guarantee (*h*) or in some other way that time may with impunity be given to the principal debtor (*i*), nor if he subsequently confirm the agreement giving time (*k*).

SUB-SECT. 4.—*Agreement by the Creditor with the Principal Debtor to give Time to the Surety.*

Agreement by creditor with debtor to give time to surety.

1042. An agreement by the creditor with the principal debtor of a binding character to give time to the surety himself discharges the latter, as its effect is to alter prejudicially his position by tying the creditor's hands from doing that which would throw the surety upon the principal debtor (*l*).

SUB-SECT. 5.—*Agreement by the Creditor with the Surety to give Time to the Latter.*

Effect of agreement by the creditor with the surety giving time.

1043. A creditor may compound with and give time to a surety, or take security from him, without discharging co-sureties or the principal debtor (*m*). Moreover, where the creditor by separate

(*c*) See *Hulme* v. *Coles* (1827), 2 Sim. 12.

(*d*) *Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch. 32, C. A., *per* LINDLEY, L.J., at p. 57; affirmed, [1894] A. C. 586.

(*e*) *Provincial Bank* v. *Cussen* (1886), 18 L. R. Ir. 382, C. A.

(*f*) *Jenkins* v. *Robertson* (1854), 2 Drew. 351. So after the forfeiture of a bail bond and an assignment thereof taken, time given to the principal debtor is no discharge of the sureties (*Woosnam* v. *Price* (1833), 1 Cr. & M. 352). Where a creditor has a judgment debt assigned to him by his debtor, he does not necessarily, by giving time to the judgment debtor, become chargeable to his own debtor (*Williams* v. *Price* (1824), 1 Sim. & St. 581, *per* LEACH, V.-C., at p. 587).

(*g*) *Reade* v. *Lowndes* (1857), 23 Beav. 361; see also *Strong* v. *Foster* (1855), 17 C. B. (N. S.) 201.

(*h*) See Encyclopædia of Forms and Precedents, Vol. VI., pp. 246, 253, 255.

(*i*) *Yates* v. *Evans* (1892), 61 L. J. (Q. B.) 446; *Cowper* v. *Smith* (1838), 4 M. & W. 519; *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531, C. A., where *Yates* v. *Evans*, *supra*, was approved, and *Kirkwood* v. *Smith*, [1896] 1 Q. B. 582, was overruled; see also *Clerk* v. *Devlin* (1803), 3 Bos. & P. 363; *Smith* v. *Winter* (1838), 4 M. & W. 454; *Tyson* v. *Cox* (1823), Turn. & R. 395; *Union Bank of Manchester* v. *Beech* (1865), 3 H. & C. 672; *Duffy* v. *Orr* (1831), 5 Bli. (N. S.) 620, H. L.

(*k*) *Mayhew* v. *Crickett* (1818), 2 Swan. 185, *per* Lord ELDON, L.C., at p. 192; *Smith* v. *Winter*, *supra*; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, *per* QUAIN, J., at pp. 676, 677.

(*l*) *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 142, *per* Lord HATHERLEY, L.C., at p. 152; affirmed *sub nom. Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (1874), L. R. 7 H. L. 348; and see *Vyner* v. *Hopkins* (1842), 6 Jur. 889.

(*m*) Chitty's Commercial Law, Vol. III., p. 326; see also *Ex parte Smith*

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contract with the surety himself, made on good consideration and without the concurrence of the principal debtor, gives the surety further time for payment of a bill of exchange accepted by the latter, and afterwards the principal debtor is released from his debt by the creditor, the surety is not discharged from liability (*n*).

On the other hand, where there are two co-sureties, and the creditor, after granting a further loan to the principal debtor and taking a new security from him for that and the former loan, gives further time to him and one of the sureties only without specially reserving the remedy against the other surety, the latter is discharged (*o*).

SUB-SECT. 6.—*Personal Laches of the Creditor.*

Laches of creditor discharging the surety.

1044. Any active omission by the creditor to do something which he is bound to do for the protection of the surety will discharge the latter (*p*), but not mere passive acquiescence in acts which, though contrary to the conditions of the guarantee (*q*), do not amount to connivance or gross negligence, equivalent to shutting the eyes to fraud or something approximating thereto (*r*).

Examples of laches.

1045. Thus a surety for the performance of a building contract is discharged from liability by the omission of the building owner to insure against loss by fire the work undertaken in accordance with a stipulation in the building contract notified to the surety before he became bound as such (*s*). So a broker buying goods for his principal and undertaking for a stated commission to indemnify him from any loss on resale is not responsible, if the principal neglects a fair opportunity of selling goods at a profit and is afterwards obliged to sell at a loss (*t*). Again, a person who has bound himself to indorse any bills that may be given in part payment of a debt to be contracted by a third person is discharged, unless

(1713), 1 P. Wms. 237, *per* Lord HARCOURT, L.C., at p. 238; *Bedford* v. *Deakin* (1818), 2 B. & Ald. 210; *Dunn* v. *Slee* (1817), 1 Moore (C. P.), 2.

(*n*) *Defries* v. *Smith* (1862), 10 W. R. 189.

(*o*) *Vyner* v. *Hopkins* (1842), 6 Jur. 889.

(*p*) *Mansfield Union Guardians* v. *Wright* (1882), 9 Q. B. D. 683, C. A., *per* HANNEN, J., at p. 688; *Carter* v. *White* (1883), 25 Ch. D. 666, C. A., *per* COTTON, L.J., at p. 670; *Strong* v. *Foster* (1855), 17 C. B. (N. S.) 201; *Wulff* v. *Jay* (1872), L. R. 7 Q. B. 756; *Durham Corporation* v. *Fowler* (1889), 22 Q. B. D. 394; *Belfast Banking Co.* v. *Stanley* (1867), 1 I. R. C. L. 693; S. C. 15 W. R. 989; *Caxton and Arrington Union* v. *Dew* (1899), 68 L. J. (Q. B.) 380; and see *Kingston-upon-Hull Corporation* v. *Harding*, [1892] 2 Q. B. 494, C. A., *per* BOWEN, L.J., at p. 508. By the civil law sureties are not discharged from their liability to the creditor where through the latter's laches to enforce his demands the benefit of a hypothec of the principal debtor is lost (*Macdonald* v. *Bell* (1840), 3 Moo. P. C. C. 315). As to passive inactivity by surety, see also p. 555, *ante*.

(*q*) *Durham Corporation* v. *Fowler*, *supra*; *Eyre* v. *Everett* (1826), 2 Russ. 381; *Mayhew* v. *Crickett* (1818), 2 Swan. 185, *per* Lord ELDON, L.C., at p. 191; *Collins* v. *Gwynne* (1833), 9 Bing. 544; *Wright* v. *Simpson* (1802), 6 Ves. 714, 734; *Trent Navigation Co.* v. *Harley* (1808), 10 East, 34; *Creighton* v. *Rankin* (1840), 7 Cl. & Fin. 325, H. L.

(*r*) *Dawson* v. *Lawes* (1854), Kay, 280.

(*s*) *Watts* v. *Shuttleworth* (1861), 7 H. & N. 353, Ex. Ch.

(*t*) *Curry* v. *Edensor* (1790), 3 Term Rep. 524; *Mutual Loan Fund Association* v. *Sudlow* (1858), 5 C. B. (N. S.) 449.

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a demand be made upon him to fulfil his promise within a reasonable and convenient time (*a*); while a surety for payment of a bill by the drawer or acceptor is no longer liable after a failure on the part of the creditor to take necessary steps which might have been taken to obtain payment of such bill before the insolvency of the drawer and acceptor (*b*). Such a surety will not, however, be discharged from liability by the omission of the creditor to render the bill complete by inserting the drawer's name (*c*). Nevertheless, the indorser of a bill of exchange, not complete and regular on the face of it, is not liable thereon as an indorser or as having entered into a contract of suretyship (*d*), and, apparently, there may be circumstances showing a contract which binds the creditor, as between him and the surety, to make the liability of the principal debtor complete, and entitles the surety to relief should the creditor not do so (*e*).

Fidelity guarantee.

1046. A surety for the good behaviour of another in an office or employment has a right to expect that persons, associated with the latter therein and who are brought in contact with him, will in all things affecting the surety's liability conduct themselves according to law and fulfil their duties (*f*). The surety will not, however, be discharged, although there are such persons who have been guilty of laches, unless it can also be proved that the person to whom the surety is bound has either prevented the principal from doing the things for the due performance of which the surety is answerable or has connived at their omission or enabled the principal to do what he ought not to have done, and that but for such conduct the omission or commission guaranteed against would not have occurred (*g*).

Treatment according to custom.

The surety is liberated if the employer does not deal with the employed in the manner required by the nature of his office (*h*). He may further require the employer to dismiss the person employed where the latter has been guilty of misconduct, and should the employer possess the power to dismiss, and not merely that of temporary suspension (*i*), and fail to exercise it, the surety will be discharged (*k*).

(*a*) *Payne* v. *Ives* (1823), 3 Dow. & Ry. (K. B.) 664.

(*b*) *Philips* v. *Astling* (1809), 2 Taunt. 206.

(*c*) *Carter* v. *White* (1883), 25 Ch. D. 666, C. A.; and see *Belfast Banking Co.* v. *Stanley* (1867), 1 I. R. C. L. 693; *Re Duffy's Estate* (1880), 5 L. R. Ir. 92.

(*d*) *Jenkins & Sons* v. *Coomber*, [1898] 2 Q. B. 168; *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 29.

(*e*) *Jephson* v. *Maunsell* (1847), 10 I. Eq. R. 132, *per* BRADY, L.C., at p. 133; and see *Carter* v. *White*, *supra*, *per* COTTON, L.J., at p. 670.

(*f*) *Mactaggart* v. *Watson* (1835), 3 Cl. & Fin. 525, H. L., *per* Lord BROUGHAM, at pp. 542, 543; *Mein* v. *Hardie* (1830), 8 Sh. (Ct. of Sess.) 346; *Mountague* v. *Tidcombe* (1705), 2 Vern. 518; *Dawson* v. *Lawes* (1854), Kay, 280; see also p. 487, *ante*.

(*g*) *Mactaggart* v. *Watson*, *supra*, *per* Lord BROUGHAM, at pp. 542, 543; *Dawson* v. *Lawes*, *supra*; *Mansfield Union Guardians* v. *Wright* (1882), 9 Q. B. D. 683, C. A.; *Madden* v. *M'Mullen* (1860), 13 I. C. L. R. 305; *Durham Corporation* v. *Fowler* (1889), 22 Q. B. D. 394.

(*h*) *Mein* v. *Hardie*, *supra*; *Mountague* v. *Tidcombe*, *supra*.

(*i*) *Byrne* v. *Muzio* (1881), 8 L. R. Ir. 396; *Caxton and Arrington Union* v. *Dew* (1899), 68 L. J. (Q. B.) 380.

(*k*) *Sanderson* v. *Aston* (1873), L. R. 8 Exch. 73; *Burgess* v. *Eve* (1874), L. R. 13 Eq. 450; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666; compare *Federal Supply and Cold Storage Co. of South Africa* v. *Anghern and Piel* (1910), 80 L. J. (P. C.) 1.

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Acts and omissions of creditor not amounting to laches.

1047. The omission by the creditor to do something which he is not legally bound to do is not laches (*l*). Hence, where a surety guarantees the honesty of a person employed, he is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty (*m*). Again, the creditor's refusal to take legal proceedings which must prove abortive (*n*), or the omission by the principal debtor, with the creditor's connivance, to do something under the principal contract diminishing the surety's risk, is not laches (*o*). Nor is it laches where, owing to the creditor's omission to reply to the surety's question, the latter wrongly interprets his silence to mean that a supply of goods to the principal debtor, stipulated for by the guarantee, has not been made, and in consequence gives up an indemnity he has received (*p*); nor where the employer merely omits to give notice to the surety of the misconduct of the employed, whose fidelity he is responsible for (*q*), unless, apparently, the surety has expressly stipulated that such notice shall be given (*r*), and even then notice need only be given of misconduct subsequent to the date of the guarantee (*s*). Again, a creditor who continues to trust the principal debtor, after the latter has been guilty of embezzlement to the knowledge of the surety, may enforce the surety's liability, in respect of a subsequent default of the principal debtor also amounting to embezzlement, although the surety has desired him not to trust the debtor any more with cash (*t*).

Provision for sale of debtor's effects.

1048. Where it is provided by deed that the principal debtor's effects shall be sold before recourse be made to the surety, the latter is not discharged by the carelessness of the trustee under the deed omitting to sell them and thereby enabling the goods to be seized and sold in bankruptcy (*a*). On the other hand, if the creditor seizes and sells the principal debtor's goods under a bill of sale, the surety may set up, as a defence to an action brought against him on his guarantee, that but for the mismanagement of the creditor's agents such goods would have realised sufficient to satisfy the guaranteed debt (*b*).

Laches by Crown or officer of the court.

1049. The Crown cannot be guilty of laches towards a surety (*c*). Moreover, the laches of an officer of the court will not, apparently,

(*l*) *Peel* v. *Tatlock* (1799), 1 Bos. & P. 419; *Byrne* v. *Muzio* (1881), 8 L. R. Ir. 396.

(*m*) *Black* v. *Ottoman Bank* (1862), 15 Moo. P. C. C. 472.

(*n*) *Musket* v. *Rogers* (1839), 5 Bing. (N. C.) 728; *Holl* v. *Hadley* (1835), 2 Ad. & El. 758.

(*o*) *Re Barber & Co., Ex parte Agra Bank* (1870), L. R. 9 Eq. 725.

(*p*) *Oxley* v. *Young* (1799), 2 Hy. Bl. 613.

(*q*) *Peel* v. *Tatlock* (1799), 1 Bos. & P. 419.

(*r*) *Byrne* v. *Muzio, supra;* but see *Enright* v. *Falvey* (1879), 4 L. R. Ir. 397; *Caxton and Arrington Union* v. *Dew* (1899), 68 L. J. (Q. B.) 380; *Snaddon* v. *London, Edinburgh and Glasgow Assurance Co.* (1902), 5 F. (Ct. of Sess.) 182.

(*s*) *Ibid.*

(*t*) *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288; see *Mountague* v. *Tidcombe* (1705), 2 Vern. 518.

(*a*) *Lancaster* v. *Harrison* (1830), 6 Bing. 726; see also p. 488, *ante.*

(*b*) *Mutual Loan Fund Association* v. *Sudlow* (1858), 5 C. B. (N. S.) 449.

(*c*) *R.* v. *Fay* (1879), 4 L. R. Ir. 606; but see *The Zoe* (1886), 11 P. D. 72.

discharge a surety from liability under his guarantee (*d*). Where, too, a statute vests in a creditor a power which he is morally bound to exercise, when the truth of the case requires it, and the debtor, by omitting to pay the guaranteed debt, has rendered the exercise of such power by the creditor necessary, the surety is not discharged from liability by its exercise, even though his position has been thereby altered for the worse, and even though he may have given notice to the creditor not to exercise it (*e*).

Surety not always wholly discharged by laches of creditor.

1050. Where the creditor has been guilty of laches, the surety is not thereby necessarily wholly discharged from liability (*f*), but may sometimes be only *pro tanto* relieved therefrom (*g*). Whether or not a surety is wholly discharged depends, apparently, to some extent upon a distinction made in equity between those rights of the surety which he acquired at the time when he entered into the suretyship and those rights subsequently acquired by him (*h*).

SUB-SECT. 7.—*Loss of Securities held by the Creditor in respect of the Guaranteed Debt.*

Effect of loss by the creditor of securities for the guaranteed debt.

1051. The surety is entitled, on payment by him of the guaranteed debt, to have all securities held by the creditor (*i*) for such debt handed over to him by the latter in exactly the same plight and condition in which they were originally received (*k*), and whether such securities were in existence at the date of the contract of suretyship or came into existence subsequently thereto (*l*). Consequently, any act of the creditor interfering with or impairing such right will, to the extent, at all events, of any loss inflicted, relieve the surety from liability (*m*), and in certain circumstances,

(*d*) *Jephson* v. *Maunsell* (1847), 10 I. Eq. R. 132.

(*e*) *Browne* v. *Carr* (1831), 7 Bing. 508, 516, where a surety for a bankrupt was held not to be discharged by the creditor signing the bankrupt's certificate, even after receiving notice from the surety not to do so.

(*f*) *Polak* v. *Everett* (1876), 1 Q. B. D. 669, C. A., *per* BLACKBURN, J., at p. 676; *Pearl* v. *Deacon* (1857), 1 De G. & J. 461, C. A.

(*g*) *Ibid.*; and see *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, 603, P. C.; *Capel* v. *Butler* (1825), 2 Sim. & St. 457; and p. 536, *ante*.

(*h*) *Polak* v. *Everett*, *supra*, *per* BLACKBURN, J., at p. 676. As to the distinction between a loss occasioned to a surety by the creditor's own act and when not so occasioned, see also *Hardwick* v. *Wright* (1865), 35 Beav. 133.

(*i*) As to the surety's rights to securities held by the creditor in respect of the guaranteed debt, see pp. 509 *et seq.*, *ante*.

(*k*) *Pledge* v. *Buss* (1860), John. 663, *per* WOOD, V.-C., at p. 667; *Newton* v. *Chorlton* (1853), 10 Hare, 646, *per* WOOD, V.-C., at pp. 652, 653; *Mayhew* v. *Crickett* (1818), 2 Swan. 185, *per* Lord ELDON, L.C., at p. 191; *Forbes* v. *Jackson* (1882), 19 Ch. D. 615, *per* HALL, V.-C., at pp. 621, 622; *Harberton* (*Lord*) v. *Bennett* (1829), Beat. 386; *Pearl* v. *Deacon*, *supra*; *Strange* v. *Fooks* (1863), 4 Giff. 408, *per* STUART, V.-C., at p. 412, where it is laid down that it is perfectly established that if through any neglect on the part of the creditor a security, to the benefit of which the surety is entitled, is lost or is not properly perfected, the surety is discharged.

(*l*) See *Pledge* v. *Buss*, *supra*; *Campbell* v. *Rothwell* (1877), 47 L. J. (Q. B.) 144, not following on this point *Newton* v. *Chorlton*, *supra*; 2 White & Tud. L. C., 7th ed., p. 555; see also *Forbes* v. *Jackson*, *supra*, at pp. 619, 620.

(*m*) *Wulff* v. *Jay* (1872), L. R. 7 Q. B. 756; *Capel* v. *Butler*, *supra*; *Williams* v. *Price* (1824), 1 Sim. & St. 581; *Straton* v. *Rastall* (1788), 2 Term Rep. 366; *Pearl* v. *Deacon*, *supra*; *Strange* v. *Fooks*, *supra*; *Watts* v. *Shuttleworth* (1861),

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apparently, altogether (*n*). Thus, where there is a mortgage security given in respect of a guaranteed debt, the creditor must hold it for the benefit of the surety, so that the latter may, on paying such debt, obtain a transfer of the mortgage in its original unimpaired condition (*o*). If the creditor does not fulfil his duty in this respect the surety is discharged (*p*).

When surety not discharged by loss of security.

1052. The liability of a surety for the principal debtor is not, however, affected by a sale by the latter of the mortgaged property (in manner contemplated by the mortgage deed) and with the consent of the mortgagee (*q*). Moreover, the creditor, on the bankruptcy of the principal debtor, is not required to keep up a policy on the life of the latter, but, on the contrary, should sell and realise such a security (*r*) or surrender the policy and prove for the whole debt (*s*). Again, a surety is not discharged where, by the conduct of the creditor, a right of distress for rent in arrear is destroyed, as a distress is not, strictly speaking, a security held by the creditor in respect of a debt (*t*). On the other hand, a surety is discharged where the creditor abandons an execution against the plaintiff debtor (*u*).

Other examples.

1053. A transaction which causes no loss of securities, or a loss not attributable to the fault of the creditor, will not discharge the surety (*a*). Thus, if a creditor, having in respect of a debt owing to him a security upon the equitable interests of his debtor, and of the latter's surety, in trust funds, assigns the debt, together with the securities for the same, he does not thereby relieve the surety from liability, and he need not even give the surety notice of such assignment in order to render it binding and effectual (*b*). Again, a temporary loan of title deeds for a legitimate purpose by the creditor

7 H. & N. 353, Ex. Ch.; *Ex parte Mure* (1788), 2 Cox, Eq. Cas. 63; *Rainbow* v. *Juggins* (1880), 5 Q. B. D. 138.

(*n*) *Rainbow* v. *Juggins*, *supra*, *per* MANISTY, J., at p. 142.

(*o*) *Pledge* v. *Buss* (1860), John. 663; and see *Strange* v. *Fooks* (1863), 4 Giff. 408; *Wulff* v. *Jay* (1872), L. R. 7 Q. B. 756; *Pearl* v. *Deacon* (1857), 1 De G. & J. 461, C. A.; *Forbes* v. *Jackson* (1882), 19 Ch. D. 615. Where a creditor takes from his debtor an assignment of a debt from a third person as a security for his (the creditor's) demand, and by the creditor's wilful default the debt becomes irrecoverable, he must bear the loss himself (*Williams* v. *Price* (1824), 1 Sim. & St. 581).

(*p*) *Pledge* v. *Buss*, *supra*.

(*q*) *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, P. C.

(*r*) *Coates* v. *Coates* (1864), 33 Beav. 249; and see *Wheatley* v. *Bastow* (1855), 7 De G. M. & G. 261, C. A.

(*s*) *Rainbow* v. *Juggins*, *supra*.

(*t*) *Re Russell*, *Russell* v. *Shoolbred* (1885), 29 Ch. D. 254, C. A.; Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; and see p. 511, *ante*.

(*u*) *Mayhew* v. *Crickett* (1818), 2 Swan. 185; *English* v. *Darley* (1799), 3 Esp. 49, 50; *Williams* v. *Price*, *supra*, *per* LEACH, V.-C., at p. 587. This was also the case, under the old law, when the execution was against the body of the debtor (*Watson* v. *Alcock* (1853), 1 Sm. & G. 319; *Wulff* v. *Jay*, *supra*; but see *R.* v. *Fay* (1879), 4 L. R. Ir. 606, 616, C. A.).

(*a*) *Wheatley* v. *Bastow*, *supra*, *per* TURNER, L.J., at pp. 279, 280; *Hardwick* v. *Wright* (1865), 35 Beav. 133; *Carter* v. *White* (1883), 25 Ch. D. 666, 670, C. A.; *Polak* v. *Everett* (1876), 1 Q. B. D. 669, C. A., *per* BLACKBURN, J., at p. 675.

(*b*) *Wheatley* v. *Bastow*, *supra*.

to the principal debtor on the latter undertaking to return them, which he subsequently does, will not, apparently, discharge the surety (*c*). Moreover, where the primary security for the guarantee debt proves worthless, whether it was originally so or became so afterwards, the surety is not discharged, unless the loss or deficiency was occasioned by the act of the creditor (*d*).

Effect of omission by creditor to perfect securities in his hands.

1054. Where there is a contract, express or implied, that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, the surety is discharged; but when there is no such contract, and the creditor only has a right to perfect what he has in his hands, which he does not do, that does not release the surety unless the latter can show that he has received some injury in consequence of the creditor's conduct (*e*).

Securities given by co-surety.

1055. Though the surety is entitled to stand in the place of the creditor as regards securities given to the latter by the principal debtor, a similar right does not extend to securities given to the creditor by a co-surety (*f*). As regards the last-named securities, the only right, apparently, possessed by a surety is that such securities shall not be wasted (*g*); and where the surety has been converted into a principal debtor, the defence of discharge by loss of securities is no longer available to him (*h*).

SUB-SECT. 8.—*Discharge of the Principal Debtor by the Creditor.*

Effect of discharge of principal debtor.

1056. Whatever expressly or impliedly discharges the principal debtor from liability usually discharges the surety also by implication (*i*), as his position is thereby altered without his consent, notwithstanding that the alteration is accomplished by operation of law. He is therefore discharged where he can establish that the alteration changes the nature of his liability (*k*), but not

(*c*) *Bushell* v. *Collett* (1862), 6 L. T. 20; *Newton* v. *Chorlton* (1853), 10 Hare, 646; but see *Pledge* v. *Buss* (1860), John. 663.

(*d*) *Hardwick* v. *Wright* (1865), 35 Beav. 133.

(*e*) *Carter* v. *White* (1883), 25 Ch. D. 666, C. A., *per* COTTON, L.J., at p. 670; *Polak* v. *Everett* (1876), 1 Q. B. D. 669, 675, C. A.; and see *Re Duffy's Estate* (1880), 5 L. R. Ir. 92; *Belfast Banking Co.* v. *Stanley* (1867), 1 I. R. C. L. 693; *Glenie* v. *Smith*, [1908] 1 K. B. 263, C. A.

(*f*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1879), 11 Ch. D. 88, C. A., *per* JESSEL, M.R., at p. 96; reversed, without affecting this point (1880), 6 App. Cas. 1; see *Forbes* v. *Jackson* (1882), 19 Ch. D. 615, *per* HALL, V.-C., at p. 622

(*g*) *Margretts* v. *Gregory* (1862), 10 W. R. 630.

(*h*) *Reade* v. *Lowndes* (1857), 23 Beav. 361; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, L.C., at p. 11.

(*i*) *Burke's Case* (undated), cited *English* v. *Darley* (1800), 2 Bos. & P. 61, 62; *Lowes* v. *Maughan and Fearon* (1884), Cab. & El. 340; *Law* v. *East India Co.* (1799), 4 Ves. 824; *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313, P. C.; *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464, C. A.; *Cragoe* v. *Jones* (1873), L. R. 8 Exch. 81; *Nevill's Case* 1870), 6 Ch. App. 43.

(*k*) *Mortgage Insurance Corporation* v. *Pound* (1895), 65 L. J. (Q. B.) 129, H. L.; *Pybus* v. *Gibb* (1856), 6 E. & B. 902; *Finch* v. *Jukes*, [1877] W. N. 211; *Stacey* v. *Hill*, [1901] 1 K. B. 660, C. A.; *Hastings Corporation* v. *Letton*, [1908] 1 K. B. 338; *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, 603, P. C.

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otherwise (*l*). Moreover, it would be a fraud on the principal debtor for the creditor to release him from liability, if the latter were then able to proceed against the surety, who, in his turn, might sue the principal debtor and thus render the alleged release nugatory (*m*).

Express release.

A surety is therefore discharged where a release to the principal debtor is executed, even by one only of two partners to whom the guarantee is given, if it is in pursuance of an agreement with the principal debtor entered into by both partners (*n*). So a voluntary deed releasing the principal debtor in like manner as if he had obtained his discharge in bankruptcy frees the surety (*o*), as does also the execution by the creditor, as a trustee thereof, of a deed of assignment releasing the principal debtor (*p*), unless the guarantee otherwise provides (*q*), or the deed releasing the principal debtor itself contain a reservation of remedies against the surety (*r*), thereby reducing it to a mere covenant not to sue (*s*).

Again, a surety for payment of a composition to creditors is discharged from liability to a particular creditor who, without his knowledge or consent, obtains from the compounding debtor an agreement binding the latter to pay the creditor's debt in full, as such a transaction avoids both the original debt and the composition (*t*).

Fraud.

When the release of the principal debtor by the creditor is accomplished by means of a fraud on the part of the former (*u*), the surety is not discharged, even if he has, though innocently and without being a party to the fraud (*a*), concurred in the representations to the creditor, on the strength of which the release was given (*b*), unless, apparently, in such a case the surety has given valuable consideration (*c*).

(*l*) *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307; *Re FitzGeorge, Ex parte Robson*, [1905] 1 K. B. 462.

(*m*) *Nevill's Case* (1870), 6 Ch. App. 43, *per* MELLISH, L.J., at p. 47.

(*n*) *Hawkshaw* v. *Parkins* (1819), 2 Swan. 539.

(*o*) *Cragoe* v. *Jones* (1873), L. R. 8 Exch. 81; and see *Mayhew* v. *Boyes* (1910), 103 L. T. 1, C. A., and cases there cited.

(*p*) *Teede* v. *Johnson* (1856), 11 Exch. 840.

(*q*) *Cowper* v. *Smith* (1838), 4 M. & W. 519; *Union Bank of Manchester* v. *Beech* (1865), 3 H. & C. 672; *Kearsley* v. *Cole* (1846), 16 M. & W. 128; *Metropolitan Bank of England and Wales* v. *Coppee* (1896), 12 T. L. R. 129, 258, C. A.

(*r*) *Kearsley* v. *Cole, supra; Keyes* v. *Elkins* (1864), 5 B. & S. 240; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9; *Davidson* v. *M'Gregor* (1841), 8 M. & W. 755; *Boultbee* v. *Stubbs* (1811), 18 Ves. 20, 22; *Re Slade, Ex parte Carstairs* (1820), Buck, 560; *Re Renton, Ex parte Glendinning* (1819), Buck, 517, 520.

(*s*) *Maltby* v. *Carstairs* (1828), 1 Man. & Ry. (K. B.) 549; *North* v. *Wakefield* (1849), 13 Q. B. 536; *Nichols* v. *Norris* (1831), 3 B. & Ad. 41; *Re Whitehouse, Whitehouse* v. *Edwards* (1887), 37 Ch. D. 683, *per* STIRLING, J., at p. 694; *Lindsay* v. *Downes (Lord)* (1840), 2 I. Eq. R. 307; *Green* v. *Wynn* (1869), 4 Ch. App. 204, *per* Lord HATHERLEY, L.C., at p. 206; *Currey* v. *Armitage* (1858), cited 4 C. B. (N. S.) at p. 221; *Bateson* v. *Gosling, supra; Webb* v. *Hewitt* (1857), 3 K. & J. 438; *Kearsley* v. *Cole, supra; Vorley* v. *Barrett* (1856), 1 C. B. (N. S.) 225; *Jones & Co.* v. *Whitaker* (1887), 57 L. T. 216, C. A.; *Muir* v. *Crawford* (1875), L. R. 2 Sc. & Div. 456.

(*t*) *Mayhew* v. *Boyes, supra.*

(*u*) *Scholefield* v. *Templer* (1859), 4 De G. & J. 429, 434; *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143, C. A.

(*a*) *Ibid.*

(*b*) *Ibid.*

(*c*) *Scholefield* v. *Templer, supra, per* Lord CAMPBELL, at p. 434. As to misrepresentation, generally, see title MISREPRESENTATION AND FRAUD.

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1057. In the case of a bill of exchange, if the holder thereof discharge a prior indorser, it is difficult, if not impossible, for him to recover against a subsequent indorser (*d*).

Discharge of prior indorser.

1058. Where, as frequently happens, the release of the principal debtor is not express, but results as a legal consequence from some transaction, the surety is equally discharged from liability. Thus, a surety for payment of instalments under a hire and purchase agreement is discharged if before having recourse to him the creditor seizes the goods and thereby determines the agreement (*e*). He is also discharged by the acceptance by the creditor of a second security in discharge of the original one (*f*), or by the substitution of a security for the personal liability of the principal debtor (*g*), or by the merger of the principal debtor's liability in a judgment recovered against him by the creditor (*h*), or, apart from the Bankruptcy Acts (*i*), by a deed of composition voluntarily entered into between the creditor and the principal debtor (*k*).

Release may be implied.

A surety for the performance of covenants in a lease for a term of years is discharged from liability if the landlord terminate the lease before the end of the term by notice under a provision in the lease enabling him to do so (*l*), while a surety for the payment of

(*d*) See *Smith* v. *Knox* (1799), 3 Esp. 46; *English* v. *Darley* (1799), 3 Esp. 49; and compare title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 517, 554. As to the liability of the drawer where the acceptor is discharged by operation of law, see *Re Jacobs, Ex parte Jacobs* (1875), 10 Ch. App. 211, following *Megrath* v. *Gray*, *Gray* v. *Megrath* (1874), L. R. 9 C. P. 216, and disapproving *Wilson* v. *Lloyd* (1873), L. R. 16 Eq. 60.

(*e*) *Hewison* v. *Ricketts* (1894), 63 L. J. (Q. B.) 711.

(*f*) *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187; and see *Tatum* v. *Evans* (1885), 54 L. T. 336; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.) 76. An agreement between a bond debtor and his creditor that the latter shall take all the debtor's property and shall pay the other creditors so much in the pound operates as a satisfaction of the bond debt (*Webb* v. *Hewitt* (1857), 3 K. & J. 438). So, if A. take a joint bond from B. and C. with D. as surety, the latter will be discharged if A. subsequently accepts the notes of B. and C. in discharge of the bond (*Skip* v. *Edwards* (1744), 9 Mod. Rep. 438).

(*g*) *Lowes* v. *Maughan and Fearon* (1884), Cab. & El. 340.

(*h*) *Faber* v. *Lathom (Earl)* (1897), 77 L. T. 168, where £1,400 having been advanced to the principal debtor on the security of three life policies under a deed, whereby the principal debtor covenanted to keep up the premiums and pay interest at 3 per cent. on the loan, while his sureties covenanted for his due performance of this covenant, it was held that a judgment subsequently recovered against him for the £1,400 operated as a merger with regard to his liability under his covenant to pay either principal or future interest, and therefore also released the sureties from future liability; see also *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A.; *Florence* v. *Jenings* (1857), 2 C. B. (N. S.) 454; *Arbuthnot* v. *Bunsilall* (1890), 62 L. T. 234; *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307; *Re Browne and Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574, C. A.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 270, 336; compare *Ellis* v. *Wilmot* (1874), L. R. 10 Exch. 10; and see p. 566, *post*.

(*k*) *Re Renton, Ex parte Glendinning* (1819), Buck, 517, 520; *Re Lewis and Potter, Ex parte Smith* (1789), 3 Bro. C. C. 1.

(*l*) *Giddens* v. *Dodd* (1856), 3 Drew. 485, where the notice to quit was held to be good though it did not refer to the proviso under which it was given. The effect of waiving a notice to quit given to a yearly tenant is to create a new tenancy, and consequently a surety for the payment of the rent under the original tenancy is not liable for rent becoming due after the time when the abandoned notice to quit would have expired (*Tayleur* v. *Wildin* (1868), L. R. 3 Exch. 303)

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rent by a company "during the term" is no longer liable when, owing to the dissolution of the company, the term comes to an end (*m*).

Where a trustee in bankruptcy disclaims a lease on the bankruptcy of the lessee, a surety "for the payment of rent which might from time to time be in arrear" is also discharged from liability in respect of a claim for rent accruing subsequent to such disclaimer (*n*), where, at least, no person has any estate in the demised premises, except the lessor and the bankrupt lessee, and the case is not complicated by the existence of any assignment or underlease (*o*).

Discharge of debtor by operation of law.

1059. Though an alteration in the position of the surety by the principal debtor's discharge or otherwise, accomplished by operation of law, may discharge him (*p*), this is not always the case. Thus, a surety who has guaranteed the payment of interest on a debenture bond issued by a company until repayment of the principal sum remains liable under his guarantee after a dissolution of the company due to the act of the law and not of the creditor (*q*). Moreover, the acceptance of a composition or scheme of arrangement by a creditor does not discharge the surety (*r*), though a surety for payment of a composition (*s*) is discharged if the debtor be adjudged a bankrupt and the composition be annulled (*t*); and he is not discharged from liability under a clause in

(*m*) *Hastings Corporation* v. *Letton*, [1908] 1 K. B. 378.

(*n*) *Stacey* v. *Hill*, [1901] 1 K. B. 660, C. A. The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (2), seems, however, to preserve the liability of the surety in such circumstances; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 193.

(*o*) *Stacey* v. *Hill*, *supra*, *per* COLLINS and ROMER, L.JJ., at pp. 665, 667, apparently in direct conflict with the opinion expressed in *Re Levy*, *Ex parte Walton* (1881), 17 Ch. D. 746, C. A., *per* JAMES, L.J., at pp. 756, 757; as to the position where there is an assignment and a guarantee for payment of rent by the assignee, see *Harding* v. *Preece* (1882), 9 Q. B. D. 281; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 193.

(*p*) *Mortgage Insurance Corporation* v. *Pound* (1895), 64 L. J. (Q. B.), 394, C. A., *per* WRIGHT, J., at p. 396; affirmed (1895), 65 L. J. (Q. B.) 129, H. L.; *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630, *per* HEATH, J., at p. 634; but see *Browne* v. *Carr* (1831), 7 Bing. 508, 515.

(*q*) *Re FitzGeorge*, *Ex parte Robson*, [1905] 1 K. B. 462. On the other hand, where a surety undertook to be liable for interest on a debenture "so long as the principal sum remains due," it was held that such liability ceased on the bankruptcy of the principal debtor (*Re Moss*, *Ex parte Hallet*, [1905] 2 K. B. 307).

(*r*) The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (19), now expressly provides that the acceptance by a creditor of a composition or scheme of arrangement shall not release any person who, under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), would not be released by an order of discharge if the debtor had been adjudicated a bankrupt, and such order of discharge does not release any person who was surety or in the nature of a surety for the bankrupt (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (4)). In view of this provision it is unnecessary to discuss cases prior thereto in which sureties claimed to be discharged by deeds of composition.

(*s*) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 18.

(*t*) *Walton* v. *Cook* (1888), 40 Ch. D. 325. Where creditors have passed composition resolutions on receiving a surety's guarantee for payment of the last instalment of the composition, they cannot, on the bankruptcy of the debtor before payment of all the instalments, be put by the surety, who has paid one instalment, to their election whether they will carry out the composition arrangement *in toto* or reject it *in toto*, but are entitled to prove under the

a composition deed releasing him only in the event of the principal debtor being adjudicated a bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the composition deed, unless one or other of such events occurs and not if the principal debtor is made a bankrupt otherwise than under the provisions of such deed (*a*). Again, a surety for a joint stock company is not discharged from liability by the reconstruction of such company under a statutory scheme of arrangement, expressly or impliedly assented to by the creditors (*b*), unless such scheme alter the event upon which the liability of the surety depends (*c*).

Effect of creditor taking additional security.

1060. Though the taking of a second security by the creditor in discharge of the original one, or in lieu of the personal liability of the principal debtor, will discharge the surety (*d*), the mere acceptance of additional security from the principal debtor will not have this effect (*e*), unless there is an agreement to give time or the intention of the parties is manifestly that the original security shall not remain in force (*f*).

Effect of a covenant not to sue the principal debtor.

1061. A mere covenant not to sue the principal debtor will not discharge the surety, especially if it be qualified by an express reservation of remedies against the latter (*g*). While language

bankruptcy for the whole amount of their original debts, after giving credit for the instalments they have received (*Re Bedell, Ex parte Gilbey* (1878), 8 Ch. D. 248, C. A.). An agreement for a composition is not an accord and satisfaction unless it be expressly agreed that it shall be (*ibid.*).

(*a*) *Glegg* v. *Gilbey* (1876), 2 Q. B. D. 6, 209; *Hughes* v. *Palmer* (1865), 19 C. B. (N. S.) 393; *Webster* v. *Petre* (1879), 4 Ex. D. 127.

(*b*) *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540; *Re English, Scottish, and Australian Chartered Bank*, [1893] 3 Ch. 385, C. A.; *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.

(*c*) *Mortgage Insurance Corporation* v. *Pound* (1895), 65 L. J. (Q. B.) 129, H. L.

(*d*) See p. 565, *ante*, and p. 571, *post*.

(*e*) *Twopenny* v. *Young* (1824), 3 B. & C. 208; *Eyre* v. *Everett* (1826), 2 Russ. 381; *Wyke* v. *Rogers* (1852), 1 De G. M. & G. 408.

(*f*) *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corporation* (*Liquidators*) (1874), L. R. 7 H. L., 348, *per* Lord CAIRNS, L.C., at p. 361; *Twopenny* v. *Young*, *supra*, *per* BAYLEY, J., at p. 211; *Munster and Leinster Bank* v. *France* (1889), 24 L. R. Ir. 82, C. A. Where, therefore, a principal and surety are indebted on the same bond, a dealing with the principal by considering him as a debtor in another sum of money, or on another security, will not discharge the surety in the first obligation (*Eyre* v. *Everett*, *supra*, *per* Lord ELDON, L.C., at p. 384). On the other hand, where a landlord advances money to his tenant on the joint note of the latter and a surety, and afterwards takes as security for this and another sum advanced at the same time an assignment of furniture of the tenant by way of mortgage, should such furniture be subsequently taken under a distress for rent in arrear the tenant and his surety will be discharged (*Pearl* v. *Deacon* (1857), 1 De G. & J. 461, C. A.).

(*g*) *Price* v. *Barker* (1855), 4 E. & B. 760; see *Nevill's Case* (1870), 6 Ch. App. 43, *per* MELLISH, L.J., at p. 47; *Green* v. *Wynn* (1869), 4 Ch. App. 204; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9; *Price* v. *Barker*, *supra*; *Keys* v. *Elkins* (1864), 5 B. & S. 240; *North* v. *Wakefield* (1849), 13 Q. B. 536; and see pp. 556, 564, *ante*. Such reservation should appear on the face of the instrument, thus excluding parol evidence thereof (*Cocks* v. *Nash* (1832), 9 Bing. 341; *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317, P. C.; *Re Renton, Ex parte Glendinning* (1819), Buck, 517, 520), though the rule is not without

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importing an absolute release will sometimes be construed to be a covenant not to sue the principal debtor (*h*), on the other hand, an alleged covenant not to sue will not be regarded as such, if the discharge thereby given be really absolute in its effect (*i*).

When no reservation of rights against surety permissible.

There can be no effectual reservation of rights against a surety where the transaction between the creditor and the principal debtor amounts to a satisfaction of the debt guaranteed, and is accompanied by a release to the latter from further liability, whether past or future (*k*).

When surety not discharged by release of principal debtor.

1062. A release of the principal debtor by the creditor will not discharge the surety, if the latter has ceased to be a surety and become himself a principal debtor, or has previously to such release paid part of the debt and given a security for the remainder (*l*), or has, in consideration of an extension of time to himself by the creditor, bound himself, without the concurrence of the principal debtor, to pay the whole sum for which he was originally surety only (*m*), or has expressly agreed to remain liable, for there is then no ground for the presumption that he is impliedly discharged (*n*).

Moreover, where the whole guaranteed debt has not been discharged, but, as to part, remains undischarged, the surety may, by apt words on the guarantee, be left liable though the principal debtor has, as regards such balance, been released as between himself and the creditor (*o*).

Death of one of several joint obligors.

1063. Where on the face of a joint bond it does not appear that any of the joint obligors are sureties for the others, the survivors

exceptions (*Re Blakely, Ex parte Harvey, Ex parte Springfield* (1854), 4 De G. M. & G. 881, C. A.; *Wyke* v. *Rogers* (1852), 1 De G. M. & G. 408; *Norman* v. *Bolt* (1883), Cab. & El. 77); and see note (*i*), *infra*.

(*h*) *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313, P. C.

(*i*) *Ibid.* A covenant not to sue one of two joint and several obligors does not prevent the covenantor from suing the other (*Dean* v. *Newhall* (1799), 8 Term Rep. 168). A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability (*Duck* v. *Mayeu*, [1892] 2 Q. B. 511, C. A.).

(*k*) *Webb* v. *Hewitt* (1857), 3 K. & J. 438, 445; *Muir* v. *Crawford* (1875), L. R. 3 Sc. & Div. 456; *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675; *Kearsley* v. *Cole* (1846), 16 M. & W. 128, 136, explaining *Ex parte Gifford* (1802), 6 Ves. 805, *per* Lord ELDON, L.C., at pp. 807 *et seq.*; *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Green* v. *Wynn* (1868), L. R. 7 Eq. 28, 32. For, where there is an absolute release of the principal debtor there can be no reservation of a right to proceed against the surety (*Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9, *per* WILLES, J., at p. 14), as where, for example, there has been a novation of a debt operating as a complete release of the principal debtor (*Commercial Bank of Tasmania* v. *Jones*, *supra*).

(*l*) *Hall* v. *Hutchons* (1833), 3 My. & K. 426.

(*m*) *Defries* v. *Smith* (1862), 10 W. R. 189.

(*n*) *Cowper* v. *Smith* (1838), 4 M. & W. 519; *Union Bank of Manchester* v. *Beech* (1865), 3 H. & C. 672; *Metropolitan Bank of England and Wales* v. *Coppee* (1896), 12 T. L. R. 258, C. A.; *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464, C. A.

(*o*) *Perry* v. *National Provincial Bank of England, supra, per* BUCKLEY, L.J., at p. 478. In this case, by the instrument under which the suretyship arose, the creditors had full powers to vary, exchange, or release securities held by them, and to give time to compound and make any arrangement with the principal debtor without discharging the surety.

cannot, after the death of one of them, allege, as a defence to an action on the bond, that they were merely sureties for the deceased obligor and are therefore discharged from liability by the release of the latter's executor (*p*).

SUB-SECT. 9.—*Discharge of a Co-surety by the Creditor.*

Effect of discharge of co-surety.

1064. It is doubtful whether the simple discharge by the creditor of one surety will, *per se*, relieve a co-surety with the latter from liability (*q*), there being a distinction in this respect between joint debtors and co-sureties (*r*). Each case depends more or less on its own special circumstances (*s*). When, however, the discharge of one of two or more co-sureties destroys the right of contribution, the rest will be discharged wholly or partially according to circumstances (*t*), even where they are severally bound (*a*).

A release of one of several joint and several sureties, without consulting the rest or reserving remedies against them, will bar the creditor's right of action against them on the guarantee (*b*). Moreover, where one co-surety is released the security given by the other will also, apparently, be discharged (*c*).

(*p*) *Ashbee* v. *Pidduck* (1836), 1 M. & W. 564.

(*q*) *Ex parte Gifford* (1802), 6 Ves. 805, 807; *Thompson* v. *Lack* (1846), 3 C. B. 540; *Evans* v. *Bremridge* (1855), 2 K. & J. 174, 183; *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675; *Done* v. *Walley* (1848), 2 Exch. 198; *Vyner* v. *Hopkins* (1842), 6 Jur. 889; *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Watters* v. *Smith* (1831), 2 B. & Ad. 889; *Ex parte Slater* (1801), 6 Ves. 146; and see *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, P. C.

(*r*) *Cardwell* v. *Smith* (1886), 2 T. L. R. 779, *per* GROVE, J., at p. 780. The principle laid down in *Cheetham* v. *Ward*, *supra*, and *Nicholson* v. *Revill*, *supra*, namely, that the discharge of one joint and several debtor is the discharge of all, does not apply to a case of a judgment recovered against one of several joint and several debtors (*Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth* (1890), 63 L. T. 546, *per* STIRLING, J., at p. 553), for, though an obligee may have entered judgment which has not been satisfied on a joint and several bond against one obligor, he is still at liberty to sue the other, notwithstanding he has obtained judgment against one, so long as any part of the demand remains due (*Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623, *per* BAYLEY, B., at p. 635); and the principle is well established that, where there is a joint obligation and a separate one also, he does not, by recovering judgment against one, preclude himself from suing the other (*ibid.*; and see *King* v. *Hoare* (1844), 13 M. & W. 494; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *Cardwell* v. *Smith*, *supra*). However, the rule that the release of one of two joint or joint and several debtors is the release of the other applies equally whether the obligation arises upon a judgment or upon any other security (*Re E. W. A.*, [1901] 2 K. B. 642, C. A., where *Re Armitage*, *Ex parte Good* (1877), 5 Ch. D. 46, C. A., is distinguished). The rule that the release of one joint debtor releases the other has, apparently, its origin in the old feudal rule that the release of one joint tenant operated to release the other (*Re Armitage*, *Ex parte Good*, *supra*, *per* JESSEL, M.R., at pp. 58, 59).

(*s*) *Cardwell* v. *Smith*, *supra*.

(*t*) *Mayhew* v. *Crickett* (1818), 2 Swan. 185, *per* Lord ELDON, L.C., at pp. 192, 193; and, as to the right of contribution, see pp. 526 *et seq.*, *ante*.

(*a*) *Ward* v. *National Bank of New Zealand*, *supra*. Where a creditor effects a compromise with the trustee in bankruptcy of one of several sureties, by which he precludes himself from receiving a dividend against the bankrupt surety's estate, the solvent sureties are discharged to the extent of the dividend, which, but for such compromise, might have been received (*Re Wolmershausen*, *Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541).

(*b*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317, P. C.

(*c*) *Hodgson* v. *Hodgson* (1837), 2 Keen, 704; and see *Bolton* v. *Salmon*, [1891] 2 Ch. 48, *per* CHITTY, J., at p. 53.

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When co-sureties not released.

One surety will not be discharged where there is no actual release of his co-surety by the creditor, but a mere compounding with or giving of time to the co-surety (*d*) or a mere covenant not to sue (*e*); or where the action of the creditor does not interfere with the right of contribution (*f*) or is done with the surety's consent (*g*); or where each surety contracts severally, it being no part of his contract that other persons shall join in it as co-sureties (*h*), unless he can show an existing right to contribution which has been taken away or injuriously affected by the release (*i*).

Where sureties are jointly liable under a guarantee, an unsatisfied judgment in an action on a cheque given by one of them in respect of the common liability is no bar to an action against the other on the guarantee (*k*), though if such judgment were satisfied both the joint sureties would be discharged from liability (*l*).

A release by a creditor of an ostensible partner in a firm does not discharge the person whose partner he has held himself out to be, as there is no right of contribution between them (*m*).

Reservation of remedies.

1065. Creditors executing a deed of composition with the principal debtor and some only of his sureties can always reserve their remedies against the remaining sureties (*n*); and in the very unusual case of a release of one co-surety, with a reservation of remedies against the other, the latter is not discharged (*o*).

SUB-SECT. 10.—*Revocation of the Guarantee.*

(i.) *By Express Agreement.*

Discharge of surety by novation.

1066. The substitution of a new contract for the old one by the parties themselves discharges the surety from liability under the latter (*p*). Thus, if the creditor take a further security in lieu of

(*d*) *Kearsley* v. *Cole* (1846), 16 M. & W. 128, *per* PARKE, B., at p. 136.

(*e*) *Price* v. *Barker* (1855), 4 E. & B. 760, *per* COLERIDGE, J., at p. 777.

(*f*) *Ex parte Gifford* (1802), 6 Ves. 805; *Re Armitage, Ex parte Halifax Joint Stock Banking Co.* (1876), 35 L. T. 554; affirmed *sub nom. Re Armitage, Ex parte Good* (1877), 5 Ch. D. 46, C. A.

(*g*) *Kearsley* v. *Cole, supra, per* PARKE, B., at p. 136.

(*h*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, 765, P. C.

(*i*) *Ibid.*; and see *Re Wolmershausen, Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541; *Re Armitage, Ex parte Good, supra.*

(*k*) *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108, C. A.

(*l*) See *Re E. W. A.*, [1901] 2 K. B. 642, C. A.

(*m*) *Re Armitage, Ex parte Good, supra.*

(*n*) *Re Slade, Ex parte Carstairs* (1820), Buck, 560. This case was decided under the old Bankruptcy Acts, which, unlike the existing Acts, did not preserve the surety's liability to a creditor executing a composition deed (see also *North* v. *Wakefield* (1849), 13 Q. B. 536).

(*o*) *Thompson* v. *Lack* (1846), 3 C. B. 540; *North* v. *Wakefield, supra*; *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38. Such a release, it seems, operates as a covenant not to sue (*Willis* v. *De Castro* (1858), 4 C. B. (N. S.) 216; *Re Armitage, Ex parte Good, supra*).

(*p*) *Taylor* v. *Hilary* (1835), 1 Cr. M. & R. 741. At common law a guarantee under seal could not formerly be discharged by parol contract before breach (*Berwick Corporation* v. *Oswald* (1853), 1 E. & B. 295; *Brooks* v. *Stuart* (1839),

the original one, of such a kind and given in such circumstances as to effect a merger of the original security, the guarantee is revoked (*q*).

Merger.

Whether the original security is merged is a question of law in each case (*r*), though whether a particular security was taken in lieu of the original one is mainly a question of fact (*s*). But there is, apparently, no merger if it be expressly stipulated that the new security shall be collateral (*t*). A security not under seal is not merged in a specialty security, unless the latter is between the same parties and is as extensive as the former (*a*). A subsisting guarantee given up by its holder to the principal debtor, his intention being clearly to waive all rights thereunder and rely henceforward on some other security in lieu of the original one, is no longer available (*b*). In the case of a bond entered into by two sureties, which expressly provides that on the death of either of them a fresh bond shall be given, the estate of the deceased surety remains liable to contribute towards payment of the guaranteed debt after a fresh bond has been given by the surviving surety and a new surety (*c*).

Substitution of new security.

1067. A new arrangement between the parties to a suretyship contract, substituting security for personal liability, will revoke the original guarantee (*d*).

Variation of guarantee before breach.

1068. A guarantee can be wholly waived and abandoned before breach by a subsequent agreement not in writing (*e*), though a mere alteration in its terms before breach must be in writing to be effectual (*f*).

9 Ad. & El. 854), as a deed could not be affected by any instrument not under seal (*Cocks* v. *Nash* (1832), 9 Bing. 341), though equity always disregarded this rule of law (*Brooks* v. *Stuart* (1839), 9 Ad. & El. 854). A parol dispensation of licence may now, however, be pleaded in any court to an action on a deed (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11)).

(*q*) *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.) 76; and see pp. 565, 567, *ante*.

(*r*) *Boaler* v. *Mayor*, *supra*.

(*s*) *Clarke* v. *Henty*, *supra*; *Gordon* v. *Calvert* (1828), 4 Russ. 581; *Eyre* v. *Everett* (1826), 2 Russ. 381; *Twopenny* v. *Young* (1824), 3 B. & C. 208, 210.

(*t*) As to the meaning of the word "collateral," see pp. 439 *et seq.*, *ante*.

(*a*) *Boaler* v. *Mayor*, *supra*; and see *Clarke* v. *Henty*, *supra*; *Bain* v. *Cooper* (1841), 1 Dowl. (N. S.) 11, 14.

(*b*) *Re Lorymer*, *Ex parte Powell* (1836), 2 Mont. & A. 533. A bill of exchange for the guaranteed debt, taken before the time prescribed by the guarantee for payment of the same and afterwards destroyed in the surety's presence, is no waiver of the guarantee (*Collins* v. *Owen* (1866), 15 L. T. 327).

(*c*) *Re Ennis* (*Sir J. J.*), *Coles* v. *Peyton*, [1893] 3 Ch. 238, C. A.

(*d*) *Lowes* v. *Maughan and Fearon* (1884), Cab. & El. 340.

(*e*) *Taylor* v. *Hilary* (1835), 1 Cr. M. & R. 741; and see *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234, *per* AMPHLETT, B., at p. 241; *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58; *Goman* v. *Salisbury* (1684), 1 Vern. 240; *Price* v. *Dyer* (1810), 17 Ves. 356, 363; *King* v. *Gillett* (1840), 7 M. & W. 55; and see, generally, title CONTRACT, Vol. VII., pp. 421 *et seq.*

(*f*) *Emmet* v. *Dewhurst* (1851), 3 Mac. & G. 587; and see *Sanderson* v. *Graves*, *supra*; *Noble* v. *Ward* (1867), L. R. 2 Exch. 135, Ex. Ch. The reason why any alteration of a guarantee must be in writing is because of s. 4 of the Statute of Frauds (29 Car. 2, c. 3), which makes an unwritten guarantee unenforceable by action; see pp. 454 *et seq.*, *ante*; and title CONTRACT, Vol. VII., p. 361.

SECT. 3. **Discharge from Liability.**

1069. A guarantee may expressly provide that it shall be revocable by notice (*g*). The effect of such a notice is merely to prevent future liability accruing under the guarantee, but in no way relieves from liability already accrued.

Determination by notice of revocation.

When a guarantee does not expressly provide for its revocation by notice, whether it can be so determined mainly depends upon whether the consideration for the surety's promise is in its nature entire or fragmentary (*h*). If the consideration be entire, no effectual notice of revocation can be arbitrarily given (*i*). On the other hand, if the consideration for a guarantee be not entire, but fragmentary, notice of revocation is certainly available to terminate the future liability of the surety (*k*).

Revocation by express release.

1070. An express release by the creditor of the surety from further liability under the guarantee will operate as a revocation thereof (*l*). Mere voluntary declarations indicating the intention of a creditor to forgive or release the surety do not, even in equity, constitute an effectual release (*m*), unless there be a consideration or other equitable ground of distinction (*n*).

(ii.) *By Death.*

Death of principal debtor.

1071. The death of the principal debtor before he has committed any default whatever will operate to discharge the surety altogether from liability under his guarantee (*o*).

(*g*) *Solvency Mutual Guarantee Co.* v. *Froane* (1861), 7 H. & N. 5; *Boyd* v. *Robins* (1858), 5 C. B. (N. S.) 597, Ex. Ch. It was formerly considered that a guarantee under seal was irrevocable (*Hassell* v. *Long* (1814), 2 M. & S. 363, *per* Lord ELLENBOROUGH, C.J., at pp. 370, 371; *Gordon* v. *Calvert* (1828), 2 Sim. 253; *contra*, *Hough* v. *Warr* (1824), 1 C. & P. 151; *Shepherd* v. *Beecher* (1725), 2 P. Wms. 288). This view no longer obtains.

(*h*) *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, 319, 320, C. A.

(*i*) *Ibid.*; and see *Calvert* v. *Gordon* (1828), 3 Man. & Ry. (K. B.) 124; *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450, *per* MALINS, V.-C., at p. 457. In the case of a guarantee given for the fidelity of a servant, apparently, if the master chooses to continue the employment after the servant has proved himself to be unfaithful, the guarantee either comes to an end or may be determined on notice given by the surety (*Lloyd's* v. *Harper*, *supra*, *per* FRY, J., at p. 307, commenting on *Burgess* v. *Eve*, *supra*, in which, though the consideration for the guarantee was entire, the guarantee was nevertheless held to be revocable because of the misconduct of the principal in respect of whose fidelity it was given; see also *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, 675, 678; *Re Consolidated Land Co., Ltd., Ellerby's Claim* (1872), 20 W. R. 855, *per* MALINS, V.-C., at p. 856); compare *Federal Supply and Cold Storage Co. of South Africa* v. *Anghern and Piel* (1910), 80 L. J. (P. C.) 1.

(*k*) *Lloyd's* v. *Harper*, *supra*; *Bastow* v. *Bennett* (1812), 3 Camp. 220; *Coulthart* v. *Clementson* (1879), 5 Q. B. D. 42, 46; and see *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401.

(*l*) See *Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138, where a trust deed securing debentures permitted the release of the sureties, which release was therefore held to be binding on the debenture-holders, including those who were not parties to such release and objected thereto. As to the effect of a release of one of several sureties on the liability of the rest, see p. 569, *ante*.

(*m*) Equity, in such cases, always followed the law; see title EQUITY, Vol. XIII., p. 68.

(*n*) *Cross* v. *Sprigg* (1849), 6 Hare, 552; but see *Yeomans* v. *Williams* (1865), L. R. 1 Eq. 184. Where a testator bequeaths the residue of his property to his widow and executrix for life, and she releases the surety for payment of a debt due to her husband's estate from payment of all interest on such debt, the release extends only to her life interest in such debt (*Coates* v. *Coates* (1864), 33 Beav. 249).

(*o*) *Sparrow* v. *Sowgate* (1623), W. Jo. 29.

SECT. 3. Discharge from Liability.

Death of surety.

1072. The death of a surety does not, *per se*, determine his guarantee (*p*). Save where, from the nature of the guarantee, it is irrevocable by notice even in the surety's lifetime (*q*), it can be revoked as to future transactions thereunder by express (*r*) or constructive (*s*) notice of his death (*r*). Constructive notice, however, does not suffice where the will of the deceased surety gives his executors the option to continue the guarantee after his death, in which case, apparently, the guarantee can only be determined by express notice (*t*). The notice of the surety's death need not, to be effectual, comply with the terms of a notice of revocation applicable where the guarantee is expressly made revocable by notice given in the lifetime of the surety (*a*), unless the latter's personal representatives are expressly required to comply therewith (*b*).

Where notice of the surety's death revokes the guarantee, it does not relieve the surety's estate from liability in respect of previous transactions.

Death of one co-surety.

1073. Where a guarantee is joint and several the death of one co-surety does not terminate the liability of the survivors, unless, apparently, they have determined it by express notice (*c*). On the death of a surety bound jointly with his principal (*d*), or with other sureties, his estate ceases to be liable, even for existing debts of the principal (*e*). Similarly, on the death of the principal debtor, before the surety with whom he is jointly liable, his assets are no longer liable, but the liability survives to the surety (*f*).

SUB-SECT. 11.—*Discharge under the Money-lenders Act*, 1900 (*g*).

Money-lenders Act, 1900.

1074. A surety may obtain a partial discharge from liability under his guarantee where the guaranteed debt consists of a loan

(*p*) *Ashby* v. *Day* (1885), 53 W. R. 631; affirmed on appeal (1886), 54 L. T. 408, C. A.; *Harriss* v. *Fawcett* (1873), 8 Ch. App. 866; *Bradbury* v. *Morgan* (1862), 1 H. & C. 249, 256; *Coulthart* v. *Clementson* (1879), 5 Q. B. D. 42, *per* BOWEN, J., at p. 46; and see *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401.

(*q*) *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A.; *Re Crace, Balfour* v. *Crace*, [1902] 1 Ch. 733; and see pp. 453, 492, 572, *ante*.

(*r*) *Coulthart* v. *Clementson, supra*; *Beckett* v. *Addyman* (1882), 9 Q. B. D. 783, 791, C. A.; *Hollond* v. *Teed* (1848), 7 Hare, 50.

(*s*) See *Harriss* v. *Fawcett, supra*; *Coulthart* v. *Clementson, supra*; *Bradbury* v. *Morgan, supra*; *Dodd* v. *Whelan*, [1897] 1 I. R. 575.

(*t*) *Re Crace, Balfour* v. *Crace, supra*; *Re Silvester, Midland Rail. Co.* v. *Silvester*, [1895] 1 Ch. 573; *contra*, *Harriss* v. *Fawcett, supra*; *Coulthart* v. *Clementson, supra*; *Dodd* v. *Whelan, supra*.

(*a*) *Coulthart* v. *Clementson, supra*; *Harriss* v. *Fawcett, supra*.

(*b*) *Re Silvester, Midland Rail. Co.* v. *Silvester, supra*.

(*c*) *Beckett* v. *Addyman, supra*.

(*d*) *I.e.*, where one of two joint debtors is, by agreement, surety for the other; see note (*n*), p. 441, and pp. 505, 506, *ante*.

(*e*) *Other* v. *Iveson* (1855), 3 Drew. 177; and see *Ashby* v. *Day, supra*.

(*f*) *Richardson* v. *Horton* (1843), 6 Beav. 185. As to the creditor's right to open a new account and appropriate payments thereto, see p. 537, *ante*.

(*g*) 63 & 64 Vict. c. 51; and see title MONEY AND MONEY-LENDING.

SECT. 3. Discharge from Liability.

of money to the principal debtor on or in respect of which the interest charged is excessive (*h*).

When obtained.

1075. This relief may be obtained, at the instance of the borrower or of the surety or other person liable, from any court in which proceedings are taken for the recovery of money lent by a money-lender, and notwithstanding that the time for repayment of the loan, or any instalment thereof, has not arrived (*i*).

(*h*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (2). As to what constitutes excessive interest, see title MONEY AND MONEY-LENDING.

(*i*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (2). The court to which the application is made has power to give a declaratory judgment, although no ancillary relief is claimed, and ought not to impose upon the plaintiff equitable terms as to repayment of the actual money advanced, as a condition of giving such declaratory judgment (*Chapman* v. *Michaelson*, [1909] 1 Ch. 238, C. A., where the lender has in the course of his business taken a mortgage from the debtor to secure the loan).

GUARDIAN AND WARD.

See COUNTY COURTS; FRAUDULENT AND VOIDABLE CONVEYANCES; INFANTS AND CHILDREN.

GUARDIANS OF THE POOR.

See ELECTIONS; POOR LAW.

GUN LICENCES.

See GAME; REVENUE.

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See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; PRISONS.

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See CRIMINAL LAW AND PROCEDURE; INTOXICATING LIQUORS.

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HALF-BLOOD.

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